IN THE

Supreme Court of the United States

No. 70.

OCTOBER TERM, 1926.

EMMONS COAL MINING COMPANY AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, *Plaintiffs in Error,*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING, PRAYING THAT NO. 70 BE SET DOWN FOR REARGUMENT WITH NO. 299, OCTOBER TERM, 1926, WHEN REACHED.

I.

Demurrage Caused by Aftermath World War Conditions, Beyond Shippers' Control. Tariff Void. Contains no Excuse Whatever From Compliance with Rigid Requirements.

The petition of Emmons Coal Mining Company and The Fidelity and Casualty Company of New

York, plaintiffs in error, in No. 70, October Term, 1926, prays for a rehearing, and that said case be set down for reargument together with Pan Handle Coal Company, Case No. 299, October Term, 1926, when same is reached, and respectfully shows unto the Court:

That on January 3, 1927, this Court affirmed the judgment below in the case of Emmons Coal Mining Co. *et al.*, plaintiffs in error, v. Norfolk and Western Railway Co., No. 70, October Term, 1926.

That petitioners will present matters of law not brought to the attention of this Court nor the lower courts.

If the decision of this Court in the Emmons case is to be universally applied, it will mean ruin and bankruptcy to shippers in the Pan Handle case and a group of cases stipulated to follow the judgment therein, involving approximately $318,642.34 demurrage charges.

The decision of this Court in this Emmons case may also seriously affect the Smokeless Fuel group of cases involving demurrage to an amount exceeding $400,000.00, with consequent ruin and bankruptcy.

This group of cases is now before the Supreme Court of Appeals of Virginia on Writ of Error for the second time, and will soon be argued.

The United States Supreme Court, in the Emmons decision, cites *Smokeless Fuel Co.* v. *Chesapeake & Ohio Ry. Co.*, 142 Va. 355, but its attention was not called to the fact that the Smokeless Fuel case is again before the Court of Appeals of Virginia.

Many of the questions, as well as the tariff, are

different in the Smokeless case from those in the Pan Handle and Emmons cases, but the fact that this Court, in its opinion in the Emmons case, cites as authority the former decision of the Virginia Court of Appeals in the Smokeless Fuel case may involve some danger.

There are other cases pending in various courts, involving large amounts, which will be seriously affected if the Emmons decision of this Court is to be universally applied.

It is extremely unusual for demurrage charges to run into the hundreds of thousands of dollars.

The natural inquiry is: What caused this most extraordinary situation?

The answer is: A great public calamity and aftermath of the World War, wholly beyond the control of these shippers or anyone else.

It will be noted by reference to pages 27 to 85, inclusive, of the record in the Emmons case, that these demurrage charges accrued from September, 1920, to and including March, 1921. That is to say, in the latter part of the year 1920 and in the early part of the year 1921.

This was during the period of deflation, financial panic throughout the world, business cataclysm and paralysis of our export trade. It came suddenly and unexpectedly.

The situation was so serious that, on the recommendation of the Secretary of the Treasury, the Congress revived the activities of the War Finance Corporation by Joint Resolution January 4, 1921, over the veto of the President, and later passed the Act of August 4, 1921, with authority to the War Finance Corporation to assist the financing of ex-

port trade to the extent of not exceeding one billion dollars at any one time (Fed. Stat. Ann. (2d), Supp. 1921, pp 26-29).

The Act discloses that the Congress considered the conditions growing out of the World War, and the disruption of foreign trade, to be still continuing.

During the early part of 1920, trade was booming, and millions of tons of coal were exported and paid for by credits established in New York by European governments and individuals.

Coal exporters had made contracts with the mines to ship coal by trainloads to the ports, to fulfill contracts of sale abroad. Pooling arrangements were made to classify coal and to avoid delay to vessels of railroad cars at the ports. There was little or no demurrage during these times and everything was going smoothly.

In the case of *Tidewater Coal Exchange* v. *B. & O. R. R. Co.*, 96 I. C. C. 612, the Commission, at page 615, says that there was no demurrage "to any appreciable extent during 1920."

The Commission said that during that period there was an urgent demand for coal, and that not until January, 1921, did demurrage accrue to any great extent.

In the latter part of 1920, suddenly and without warning, there was business collapse, paralysis of export trade, crash of the stock market and financial panic.

We print as Appendix "A" hereto, a chart or curve, appearing in "The Annalist," August 13, 1926, a New York Times Company weekly publication. This chart, or curve, deals with a period of 42 years, from 1884 to 1926. It shows that the de-

pression of 1920-1921 was the most precipitate and most severe, as contrasted with any period for 42 years between 1884 and 1926. It was more severe than 1914, when the World War broke out.

The immediate cause of the business collapse was the discontinuance of credits by the United States to foreign governments, and the exhaustion of the ten billion dollar loan which had been made by this country.

The termination of these credits and the exhaustion of the ten billion dollar loan left Europe without funds, and parties and concerns buying coal for use in Europe suddenly began to cancel contracts in the latter part of 1920; so that the exporters of coal who had made arrangements with the mines found the coal rolling to the ports in huge volume, and were utterly unable to stop it instantaneously, or to dispose of the coal when it reached the port—through no fault of their own, but purely as a result of after-war conditions, a process of deflation and general readjustment throughout the world, accompanied by inevitable trade convulsions.

In 1921 the exports of coal from this country precipitately fell off approximately fifteen million (15,000,000) tons, as contrasted with 1920—according to official reports of the United States Department of Commerce (see p. 508, Statistical Abstract of U. S. 1924, Bureau of Foreign and Domestic Commerce, U. S. Dept. of Commerce).

The Department of Commerce Official Reports show that exports to Europe from this country fell off during 1921 more than three billion ($3,176,576,001.00) dollars, as contrasted with 1920, (see Ninth Annual Report of Secretary of Commerce, p. 50).

The Thirty-fifth Annual Report of the Interstate Commerce Commission for 1921, at page 47, shows that on April 8, 1921, there were 507,274 idle cars on the sidetracks and storage rails of the carriers of the United States—the greatest number ever known in their history. There were literally miles and miles of idle cars standing on the sidings of the railways in this country.

It was a matter of common knowledge and everybody saw them.

There were more than twice as many idle cars as there were in 1914, the year of the outbreak of the World War. In 1914 the greatest number of idle cars was 240,000, in June (see Information Bulletin No. 13, Jan. 22, 1922, page 1, Comparison of Abnormal Surpluses, issued American Railway Association, Car Service Division).

The same Bulletin shows the greatest number of idle cars in 1915, was about 305,000 in April.

The dumping and release of these coal cars in the Emmons case would simply have increased the number of idle cars, already the hugest on record.

Nobody who could use a car was deprived of a car.

The chief object of demurrage rules is to penalize shippers for holding cars after free time, so as to enable other shippers to get cars when they need them, and to enable railways to use their cars.

> "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars."
> *P. R. R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U. S. 319, 353; 64 L. ed. 928, 930.

Dumping and releasing these cars in the Emmons case would have helped no one. Certainly failure to dump and release them harmed no one. Indeed, it might have been a benefit to the railways to let them remain where they were, rather than be put to the trouble and expense of hauling the empties away and parking them on already overcrowded storage tracks.

Similar considerations were expressly mentioned by this Court in a case which we will cite later.

Under a clause in the published Uniform Bill of Lading, the railway has a right to unload the cargo and store it at the expense of the shipper, and restore the car to service. The railway did not avail itself of this right.

In the Smokeless case now pending in the Virginia Courts, it is stated in the record that defendants, Smokeless Fuel Co., were ready to prove that the Chesapeake & Ohio Railway Company, through its Vice President in charge of traffic, took the statesmanlike view that both shipper and carrier, without fault of either, had been overtaken by a common catastrophe; that the shipper was powerless to unload, and the railway powerless to obtain loads for empty cars, and that this company would be glad to remit this demurrage if any legal way could be found to do so.

But, owing to the danger of prosecution for departures from the tariff, and the Commission's rule that all efforts to collect tariff charges must be exhausted by the railways, the Chesapeake & Ohio Railway felt obliged to sue for collection.

The railroads themselves did not omit to ask the Congress for aid on account of war conditions in

1920, and did not fail to ask the Congress to recognize the existence of war conditions in 1920.

In response to the request of the railroads, the Congress did recognize the existence of war conditions in 1920, and by the Transportation Act, 1920, (41 Stat. at L. 456) provided a guaranty period of 6 months from March 1, 1920, for the benefit and assistance of the railroads.

The railroads availed themselves of these benefits, and received many millions of dollars to help them tide over the difficult readjustment period which was an aftermath of the World War.

But, in issuing their demurrage tariffs covering this period, no aid, assistance or excuse was given to shippers by the railroads, notwithstanding the shippers were victims of the great business public calamity which followed the war.

The sole question here is the construction of N. & W. Tariff I. C. C. 2828-B (printed at pp. 15 and 16, Record, Emmons case, and also as Appendix "B" hereto).

The construction of a tariff is a question of law for the Court.

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. ed. 943.

Turner, etc., Lumber Co. v. *C. M. & St. P. Ry. Co.*, 271 U. S. 259.

Construction includes matters making the instrument void; also matters involving the meaning of the phraseology employed.

Norfolk & Western tariff I. C. C. 2828-B is void on its face, and these demurrage charges are invalid and cannot be collected.

This tariff requires shippers to unload within a peremptory, absolute time, without containing any excuse or exemption whatever from penalties on account of circumstances beyond the shippers' control preventing his unloading.

This Court in numerous cases has settled clearly and definitely that where a statute or demurrage rule prescribes a rigid, inexorable and absolute time for furnishing or unloading a car, and contains no excuse whatever, providing that a party shall be exonerated on account of circumstances beyond his control, it is void on its face and penalizes a party for failure to do the impossible.

The leading case is that of *Houston & Texas R. Co.* v. *Mayes*, 201 U. S. 321, 50 L. ed. 772.

In that case, the facts were that the State of Texas had passed a statute requiring railroads to furnish cars upon demand, not to exceed six days from the receipt of the shipper's application. Upon failure of the railroad to comply within the time, it was made liable to the shipper in the sum of $25 per day for each car it failed to furnish. It was also provided that the railroad should pay the shipper all damages incurred.

The Act provided that the law "shall not apply in cases of strikes or other public calamity." These were the only conditions which would excuse the railroad from furnishing cars under circumstances which it could not control, such as "an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities," etc. (201 U. S. 321, 331, 50 L. ed. 772, 776).

It is interesting to note that the Supreme Court

of the United States held this Act to be unreasonable and void, because *inter alia* it failed to provide that the railroads would be exempt from damages or penalties in the case of "an unexpected turn in the market."

It would seem that, if an Act of the Legislature of the sovereign State of Texas is unreasonable and void because it fails to provide exemptions in the case of "an unexpected turn in the market," that a demurrage rule in the tariff of a common carrier must likewise be unreasonable and void for failure to incorporate a provision exempting the shipper from payment of demurrage charges in the case of a great business cataclysm, caused as an aftermath of a World War. The United States Supreme Court considered an ordinary depression or "unexpected turn in the market" a sufficient omission to declare void for unreasonableness the Texas statute.

We have already called this Court's attention to the fact that the Texas statute contained a provision that the law "shall not apply in cases of strikes or other public calamity," and, notwithstanding this, the Supreme Court of the United States held the Act unreasonable and void because it did not also contain additional provisions for exemption.

N. & W. tariff I. C. C. 2828-B contains no excuse whatever, not even "strikes and public calamity."

We call the Court's attention to the following language used in the opinion of the Supreme Court of the United States in the *Mayes Case:*

> "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight

and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather.

"A dereliction of the road in this particular, which may have occurred from circumstances wholly beyond the control of its officers, is made punishable not only by damages actually incurred by the shipper in the detention of his stock, but, in addition thereto, by an arbitrary penalty of $25 per car for each day of detention. The penalty which was assessed in this case, though the detention was only for one day, amounted to nearly as much as the damages, and might, in another case, amount to far more."

Houston & Texas C. R. Co. v. *Mayes*, 201 U. S. 321, 50 L. ed. 772, 775-776.

Again, in the same case, the Supreme Court says:

"It should be borne in mind that the act does not apply to cattle alone, but to all cases 'when

the owner, manager, or shipper *of any freight of any kind* shall make application in writing,' etc. The duty of the railroad company to furnish the cars within the time limited is peremptory and admits of no excuses, except such as arise from strikes and other public calamities. If, for instance, the owner of a large quantity of cotton should make a requisition under the act for a number of cars, the railway company would be bound to furnish them upon the day named, or incur a penalty of $25 for each car, though the detention of the cotton involved no expense to the owner, or may even have resulted in a benefit to him through a rise in the market.

"While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where, by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance."

Houston & Texas R. Co. v. *Mayes*, 201 U. S. 321, 50 L. ed. 772, 776.

It is respectfully submitted upon the above reasoning, so clearly stated by the United States Supreme Court, that a demurrage tariff which compels a shipper to pay a penalty—which accrued during a period of world-wide business depression, caused by a process of deflation inaugurated by the government of the United States under circumstances wholly beyond the control of the shipper—is unreasonable and void on its face, because it does

not contain provisions exempting the shipper under such circumstances.

It will be noted that in the *Mayes case* the Supreme Court of the United States condemns as unreasonable and void a statute of the State of Texas because it makes no exception in the case of "an actual inability to furnish cars by reason of their temporary and unavoidable detention."

The tariff now in question is unreasonable and void because it makes no exception for the actual and admitted inability of the shipper to dispose of the coal, growing out of a sudden and unexpected stoppage of foreign credits by the United States government, the enormous, sudden and unexpected cancellation of coal contracts by foreign governments and purchasers, etc., etc.—circumstances wholly beyond the shippers' control.

It will also be noted that the Supreme Court of the United States declares this Texas statute void because it fails to make an exception in the case of "a dereliction of the road * * * which may have occurred from circumstances wholly beyond the control of its officers."

So the tariff in the case at bar is unreasonable and void because it fails to contain an exception excusing the shipper for a dereliction in the detention of cars "which may have occurred from circumstances wholly beyond the control" of the shipper.

It will also be noted that the Supreme Court gives an example, or illustration, as to the shipment of a quantity of cotton for which requisition of cars has been made and which has not been complied with, and the Court points out that the penalties of the Act are unreasonable because "detention of the

cotton involved no expense to the owner or may even have resulted in a benefit to him through a rise in the market."

In other words, failure to furnish the cars would harm no one.

So in the case at bar, the tariff is unreasonable and void because, if the shipper in 1921 had dumped the cars, they would simply have been returned to the sidetracks and added to the number of idle cars already there, and the mere detention of the cars with the coal at Lambert's Point involved no expense to the railway and did no harm to anybody. At that period, there was no use or demand for cars.

No other shipper was deprived of cars. The chief object of demurrage rules is to penalize shippers for holding cars after free time, so as to enable other shippers to get cars when they need them.

> "The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars."
> *Penna. R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U. S. 319, 353; 64 L. ed. 928, 930.

It is interesting to note that in the *Kittaning case* the court had before it the construction of what is known as the Uniform Demurrage Code, which applies to all freight in the United States, except freight for transshipment at the ports, which latter is expressly excepted from the Code, and it is therein provided that each individual railroad shall formulate demurrage rules for tidewater freight.

The court cites at length, in a note, certain rules from the Uniform Demurrage Code, and it appears that in this Uniform Demurrage Code there are in-

corporated excuses exempting a shipper from unloading within the time prescribed, on account of weather conditions preventing unloading, and on account of the fault of the carrier, such as bunching cars.

But, in Norfolk & Western tariff I. C. C. 2828-B, involved in the present case, there is no excuse whatever, neither weather conditions, bunching cars nor other fault of the carrier, act of God, strikes, public calamity, nor anything else.

An examination of the record in the *Mayes case,* in the United States Supreme Court, shows that the court took judicial notice of the fact that circumstances might arise which would make it impossible for the party to comply with the demurrage rule of the statute.

This feature is mentioned, and pointed out, by the Supreme Court of Appeals of Virginia, in the case of *Southern Ry. Co.* v. *Commonwealth,* 107 Va. 771, 60 S. E. 70, wherein the Demurrage Rules of the Virginia State Corporation Commission were held to be void because containing no excuse.

The Supreme Court of Appeals of Virginia says that the Texas statute—

> "* * * was held invalid on the declared ground that exceptions were not made for cases which might occur, rendering the carrier unable to furnish cars within the time specified; but a careful examination of the printed record in that case fails to disclose any evidence of a washout or sudden congestion of traffic, or unavoidable detention of cars in other states, or in other places in the same state, or any other circumstances which the court declared should excuse the railroad company from furnishing cars

applied for. In other words, the court took judicial notice of the fact that such conditions might arise, and for that reason the statute was 'likely' to do great injustice to the roads, * * *"

Southern Ry. Co. v. *Commonwealth,* 107 Va. 771, 780, 60 S. E. 70.

We will cite further authorities as to judicial notice later.

The *Mayes case* has been followed and cited with approval many times. See—

McNeill v. *Southern R. Co.,* 202 U. S. 561, 50 L. ed. 1148.

New Mexico ex rel McLean v. *Denver & R. G. R. Co.,* 203 U. S. 50, 51 L. ed. 86.

People ex rel. Stead v. *Chicago, I. & L. R. Co.,* 223 Ill. 592, 79 N. E. 144.

Atlantic Coast Line R. Co. v. *Mazursky,* 216 U. S. 122, 134; 54 L. ed. 411, 417.

Southern R. Co. v. *Reid,* 222 U. S. 425, 441; 56 L. ed. 257, 262.

Savage v. *Jones,* 225 U. S. 501, 525; 56 L. ed. 1182, 1191.

Yazoo & Mississippi Valley R. Co. v. *Greenwood Grocery Co.,* 227 U. S. 1, 57 L. ed. 389, 391.

Hampton v. *St. Louis, I. M. & S. R. Co.,* 227 U. S. 456, 464; 57 L. ed. 596, 598.

Simpson v. *Shepherd,* 230 U. S. 352, 401; 57 L. ed. 1511, 1542.

Chicago, R. I. & Pac. R. Co. v. *Beatty,* 234 U. S. 753; 58 L. ed. 1577.

Michigan C. R. Co. v. *Michigan R. R. Comm.,* 236 U. S. 615, 635; 59 L. ed. 750, 758.

Illinois C. R. Co. v. *Mulberry Hill Coal Co.*, 238 U. S. 275, 279; 59 L. ed. 1306, 1308.
Southern Railway Co. v. *Commonwealth*, 107 Va. 771; 60 S. E. 70.
Southern Railway Co. v. *White*, 284 Fed. R. 560 (C. C. A. 6th Cir.).

In the case of *Yazoo & Mississippi Valley R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1, 57 L. ed. 389, above cited, the Supreme Court of the United States declared that a demurrage rule of the Mississippi Railroad Commission was void because it was absolute, and made no allowance whatever for any justifiable and unavoidable cause for failure to deliver cars within the peremptory time required by the rules.

In the case of *Chicago, R. I. & P. R. Co.* v. *Beatty*, 234 U. S. 753, 58 L. ed. 1577, the Supreme Court declared a demurrage statute of the State of Oklahoma void on the authority of the *Mayes case*. The doctrine had become so well settled at the time this case was decided that the Court merely entered a memorandum opinion "upon the authority of *Houston & T. C. R. Co.* v. *Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Yazoo & M. Valley R. Co.* v. *Greenwood Grocery Co.*, 227 U. S. 1, 57 L. ed. 389, 33 Sup. Ct. Rep. 213" (58 L. ed. 1577).

In the case of *Southern Railway Co.* v. *White*, 284 Fed. 560 (C. C. A., 6th Circuit), the Circuit Court of Appeals affirmed the judgment of the District Court for the Eastern District of Tennessee, rendered by Judge Sanford, now Mr. Justice Sanford of this Court.

The facts in that case were that a shipper on a logging road ordered cars, and they were sent up to

his plant on the logging road. Shortly after the cars were delivered at the plant, a heavy storm washed away a bridge intervening between the shipper's mill and the junction point with Southern Railway, and the cars could not be returned because the bridge was physically destroyed and there was no way of getting them back within the time prescribed by the demurarge tariff.

The demurrage tariff, as usual, contained no excuse for failure to load the cars and return them within the absolute, peremptory time prescribed. The court held that under such a tariff no demurrage charges could be collected.

So we see that it is clearly settled by repeated decisions of this court, and other courts, that a demurrage statute or tariff is void when it fails to contain any excuse whatever by which the shipper may be exonerated from unloading a car, or a railway company may be exonerated from furnishing a car, under circumstances beyond the control and power of the party, making it impossible for him to comply with the rigid, peremptory, absolute requirements of the tariff.

Such a tariff is void on its face as a matter of law.

A mere inspection of Norfolk & Western demurrage tariff I. C. C. 2828-B, printed as an appendix hereto, shows that it is void on its face, under these decisions, and no demurrage charges can be collected under this tariff.

II.

Members of Pool Tenants in Common in Mass of Fungibles. No Substitution. Each Partitioned and Dumped His Own Coal, Not that of Another Member.

We now come to the phraseology of Norfolk & Western tariff I. C. C. 2828-B.

In this connection, we call attention to another matter of law which has been overlooked by the Commission and the lower courts, and does not seem to have been presented for their consideration.

All these decisions of the Commission and the lower courts discuss pooling coal, but entirely omit and overlook the nature and effect thereof.

The pooling of coal results in making all contributors tenants-in-common in a mass of fungibles, just as a number of people who put grain in an elevator.

This is obvious and well settled. *New River Collieries Co.* v. *Snider,* 284 Fed. 287; *Coyle* v. *McNeil,* 284 Fed. 298.

In the latter case, at page 298, Judge Learned Hand says:

> "I have already, in the New River Collieries case, 284 Fed. 287, stated my reasons for believing that each pool was to be treated as a mass of fungibles owned in common, the shares being determinable by the deposits and withdrawals of the members * * * The earmarking of cars would become irrelevant, since upon their arrival it was the common purpose of all that they should lose their proprietary identity." (284 Fed. 298-299.)

Judge Learned Hand said, in the *New River Collieries* case: After shipping his coal into the pool, the shipper was entitled—

> "* * * to an aliquot share in the whole pool, dependent upon his proportion of the whole" (284 Fed. 287, 290).

In the case of *Norfolk & Western Ry. Co.* v. *Fort Dearborn Coal Co.*, 280 Fed. 264, the Circuit Court of Appeals for the Fourth Circuit, in an opinion by Judge Knapp, held that when coal passes Bluefield, under the arrangement of the Lambert's Point Coal Exchange, the shipper has no right to divert it, as it has already become a part of the pool. It was further held that when it becomes a part of the pool, the coal loses its identity.

It was further held that where a railroad confiscates the coal before it reaches the pier, the measure of damages for the conversion is the credit of the shipper on the books of the Exchange, segregation and partition having been made by the railroad.

In the case of *Tidewater Coal Exchange* v. *B. & O. R. R. Co.*, 96 I. C. C. 612, the Interstate Commerce Commission says:

> "The coal was not pooled in the sense of being dumped into storage bins, but remained in the cars on storage tracks assigned to that particular grade of coal until unloaded into vessels or otherwise disposed of. During the period June, 1920, to November, 1920, the exchange had from 18 to 20 different pools at one Baltimore pier.
>
> "When a car entered a pool it lost its identity, and when the shipper to whose account the car was credited desired coal of the same quality and quantity to be dumped into a vessel, it

> was dumped from cars most convenient in the pool, without respect to its actual ownership." (96 I. C. C. 612, 614.)

The effect of pooling cannot be ignored and overlooked. Yet that very thing has been done before the Commission and throughout these cases in the lower courts.

The word "pool" is used frequently, but the nature and effect of a pool has been entirely ignored—naturally with erroneous and confusing results.

Throughout the opinion of the Commission, and throughout the opinions of the lower courts, there is constant reference made to one shipper substituting the car of another shipper, dumping the coal of another shipper, etc., etc.

This is erroneous and meaningless in connection with a pool, because all shippers in the pool are tenants-in-common of a mass of fungibles and each is entitled *per my et per tout* in the total mass of coal according to the proportion which he has put into the pool.

When he takes that proportion of coal which he has put into the pool out of the pool, he separates and partitions it from the pool, and it is his individual property immediately after the partition and separation. He can give, and does give, good title to the purchaser.

He does not dump another shipper's coal at all; he dumps his own coal. There is no substitution.

All calculations based on the theory that another shipper's coal has been dumped are erroneous. All calculations in these cases are made on that erroneous assumption.

Now, when a pool member dumps from a coal pool 5,000 tons of coal owned by him, the moment it is partitioned from the pool and that coal is dumped from a group of cars, all of the same or of varying capacity, what is to be done about assessing demurrage charges per single car?

The demurrage tariff ought to show this.

Demurrage charges must be published.

> "The right to assess charges for undue detention existed at common law. Now they are subject, like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes."
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> *Turner, Dennis & Lowry Lumber Co.* v. *C. M. & St. P. Ry. Co.*, Official Reports U. S. S. Ct., Preliminary Print, 271 U. S. 259.
>
> See also Par. 7, Sec. 6, Transportation Act, 1920 (41 Stat. L. 483).

But when we refer to Norfolk & Western Tariff I. C. C. 2828-B (R. 15-16), we find there is not a word about this situation; not a word as to how demurrage charges should be assessed in reference to dumping from a pool; and not a word authorizing performance of the service itself.

The whole thing is entirely *casus omissus*.

The moment the coal went into the pool it lost its identity, under the rules of the Exchange (Rule 2, R. p. 112).

And the coal contained in any and all the cars in the pool was subject to be dumped by any member up to the extent of his credits on the books of the coal exchange (Rule 15, R. p. 115).

No member in a pool could have, or did have, an ear-marked amount of coal, nor an ear-marked car containing same. Otherwise, there would have been no pool.

All orders for dumping had to be made by the Exchange Manager (R. 115-116).

In the case at bar, cars were invariably dumped from the pool, irrespective of "their proprietary identity," to use the phrase of Judge Learned Hand.

Emmons' fallaciously supposed individual cars (which were in reality common tenancy cars), were dumped by some other member from the pool. (R. 27-86, N. & W. Exhibits.)

In the testimony before the Commission in this case, Emmons Co., and all others being parties, entitled *Smokeless Fuel Co. Inc.* v. *N. & W. Ry. Co.*, I. C. C. Docket 13281, Reported 85 I. C. C. 396, the principal witness for Norfolk & Western Railway Company, Mr. Gutheim, at page 222, says:

> "It wasn't coal in a pile; it was coal in cars; and there the identity of the cars as to initials and numbers were lost sight of."

Which is precisely what Judge Learned Hand said (284 F. 298-299.) Throughout the whole period, the cars were operated by the railway as a pool.

So that, in connection with a pool of coal, it is perfectly meaningless to talk about one member taking another member's coal, or another member's car.

The testimony before the Commission is not in the Record, but it may be permissible to refer to it, as this is a case "not in the nature of a private liti-

gation * * * but was a matter of public concern in which the whole body of shippers was interested." *A. J. Phillips Co.* v. *Grand Trunk W. R. Co.*, 236 U. S. 662, 665.

Later, we will make one or two references to the testimony taken before the Commission in this case, but will not pause to explain that we do it upon the idea of public interest, as indicated in the Phillips case.

We realize and admit that this testimony is not in the Record before this Court, and that technically it cannot be referred to.

But the few passages which we will quote hereafter, corroborate and support the record in this case and the demonstrations therefrom, and will be wholly out of the mouths of N. & W. Railway witnesses and we hope will aid this Court.

When a pool member dumps 5,000 tons of coal, it may be dumped from a group of cars of different capacities—40 tons, 50 tons, 100 tons. The demurrage charge is always per car, irrespective of capacity.

In the *Kittaning Case*, 253 U. S. 319, 324, 64 L. ed. 928, 930, this Court called attention to the difference between the car and the cargo, and pointed out that it was the cargo which was frozen, and not the car; and that the unit of demurrage charges was always "the single car."

Nothing was done, and there is nothing in the record to show that anything was done, with reference to changing the demurrage tariffs or the railroad bookkeeping methods, so as to reflect the situation growing out of the creation of the pool.

Hence, we have confusion worse confounded.

Norfolk & Western demurrage tariff I. C. C. 2828-B is a tariff framed for the purpose of applying only to individual shippers, such as the Standard Oil Company, United States Steel Corporation, or any other individual. It is the same individual tariff which was in existence for years, with minor changes from time to time, but with no change to cover the pooling idea.

It is claimed that a change was attempted. But it did not and does not cover the pooling idea.

The demurrage bookkeeping methods of the railroad are framed with respect to individual shippers.

It never occurred to the railroad to change its demurrage tariff or to change its methods of bookkeeping so as to cover the handling of coal in a pool. This vital change in the status of the shipper was not reflected in the tariff, nor in the bookkeeping methods of the railway.

Tariff changes were made by other railroads operating coal pools, and methods of bookkeeping entirely different from those of the Norfolk & Western were used.

The Chesapeake & Ohio Railway, at least temporarily, felt it necessary to frame a tariff expressly dealing with the pool idea, and the operations of the Newport News, Virginia Coal Exchange.

Unquestionably, the requirements of Sec. 6 of the Commerce Act make it obligatory on the Railways to publish a tariff specifically authorizing every service and every charge, and the tariffs of all the railways should have provided in some manner for the service connected with the operation of a pool, and the demurrage charges in connection with the operation of a pool.

Rules 5 and 6 of Chesapeake & Ohio Tariff I. C. C. No. 9176, filed with the Commission May 20, 1922, effective June 24, 1922, read as follows:

"Rule 5.—On coal consigned to the Newport News, Va., Coal Exchange, Incorporated, Newport News, Va., for account of its members, the following will govern:

"The Chesapeake & Ohio Railway Company will submit a statement to the Exchange at the close of each calendar month as required by its tariffs, itemized to show dates of arrival and release of cars, covering total demurrage accruing against the Exchange during the month. The Exchange will compile car or tonnage days detention accounts against each member and apportion to each member having car or tonnage days detention during the calendar month in which the demurrage accrued, his proportion on the basis of his car or tonnage days detention, as compared to the total car or tonnage days detention. Bills to individual members will then be rendered by The Chesapeake & Ohio Railway Co., in accordance therewith, and payment must be made by members immediately on receipt of bill.

"Rule 6.—Members shall sign an agreement on Exchange Form 'C' to the effect that they will be responsible for, and pay to the carriers all freight charges (when waybilled collect) and vessel loading charges and pay to the Chesapeake & Ohio Railway Co., the assigned proportion of any demurrage charges for their account, this agreement reading as follows:

"I (or we) hereby agree to pay all freight charges, when waybilled collect, loading charges, and car demurrage charges assigned to me (or us) by authority of the Commissioner or Deputy Commissioner of the Newport News Coal Ex-

change, Inc., on coal shipments going into vessels for my (or our) account at Newport News, Va., under the Newport News Coal Exchange, Inc., Agreement, whether shipped from mines, or obtained elsewhere, or for my (or our) account, or for the account of any other member of the Exchange."

The above rules, inserted in C. & O. tariff I. C. C. 9176, are steps in the right direction, and recognize the statutory obligation.

Of course, it is quite obvious that these Rules 5 and 6 do not completely cover the entire subject of services and demurrage charges in connection with the operations of a pool. However, they show a greater effort than was attempted by Norfolk & Western tariff I. C. C. 2828-B, which contains nothing whatsoever on the subject.

It is more than doubtful whether the services growing out of operating a pool of coal could be performed at all without specific tariff authority.

Davis v. *Henderson*, 266 U. S. 92, *C. & O. R. Co.* v. *Westinghouse, etc. Co.*, 270 U. S. 260, and numerous cases cited in Section III herein.

There is nothing in the record explaining how the Norfolk & Western Railway kept its demurrage books. There are various statements by counsel on the briefs, but no testimony in the record.

The books were kept on the theory that one member of the pool dumped coal belonging to another member. It is said throughout the decisions below that A would dump coal belonging to B.

The books were not kept on the true basis of fact that all the members of the pool were tenants-in-common in a mass of fungibles, and that when one

member dumped coal from the pool, he thus partitioned his share and dumped his own coal and not that of some other member.

If the books had been kept on the true basis of fact, reflecting the tenancy in common, and the partition by a member of his own share when dumping took place, and not on the fanciful, fallacious theory of A dumping B's coal, the difference in the resulting final accounts would be profound, both as to amounts and as to the party to be charged.

Correct books would show that a pool member tenant-in-common had partitioned and dumped his own coal. They would show the history of the arrival and dumping, and release of the cars, taken from the books of original entry, and would show the demurrage for undue delay computed on these cars, and would charge same against the dumping member. The railway has a lien on the coal for demurrage charges, just as a ship has a lien for demurrage on the cargo, and an action *in personam* against the owner of the cargo.

Correct books would not show these cars carried on the accounts in the name of someone else, and demurrage charged to someone else, as is done in the case at bar, growing out of ignoring the nature and effect of pooling coal, the great basic fact in the case.

At pages 28 to 84, inclusive, of the record, appear certain exhibits introduced by the railway.

These are a species of ledger accounts, and not the books of original entry, such as waybills, talley sheets, etc.

These exhibits show, or if not, they are explained by counsel to show, certain cars in which Emmons

Company had loaded coal at the mines. Emmons Company pooled the coal as it passed Bluefield. The coal, after reaching Lambert's Point, was dumped by a pool member other than Emmons Company—name not given, and dumping date not given.

These exhibits, together with counsel's explanation, show that the coal in these cars, and the cars themselves, were treated as belonging to the Emmons Company, and not to the pool member tenant-in-common who actually dumped them.

These exhibits, together with counsel's explanation, show that these cars were carried in the demurrage accounts against Emmons Company, and demurrage was charged against Emmons Company.

These exhibits, together with counsel's explanation, show that the transaction was not treated as closed on the demurrage books when a pool member tenant-in-common in this mass of fungibles partitioned his own coal, and dumped his own coal, from his own cars containing same, but the cars, or rather, the ghosts of these cars, were thereafter continued to be carried against Emmons Company on the demurrage accounts until "equivalent tonnage was actually delivered."

So, under this method of bookkeeping, which wholly ignores the nature and effect of the pool, we have demurrage charged against a party other than the owner of the coal and the cars. The transaction is not closed when the party dumps his own coal from his own cars, but demurrage is permitted to continue and increase on the books, not against the owner of the coal and the cars dumped, but against someone else.

The demurrage is charged against Emmons Com-

pany, which never owned the coal or the cars, individually, except between the time the shipments were passing from the mines to Bluefield, West Virginia.

When the coal reached Bluefield, it went into the pool and was owned by Emmons & Company as tenants-in-common with all other members of the pool, and this status continued until the coal was segregated and partitioned from the pool by the dumping member.

It became the individual property of the dumping member at the moment of partition, who could give and did give good title to the purchaser in Europe or elsewhere.

Emmons Company had no right, title or interest in, or relation whatsoever to, the coal or the cars containing the coal, after the moment of partition by the dumping member.

Emmons Company is certainly the wrong party to charge with demurrage on these cars.

Emmons Company had nothing whatsoever to do with the coal, or the cars, after partition from the pool.

The books, as kept by the railway, result in charging the wrong party.

The books, as kept by the railway, result in charging the wrong amount of demurrage.

These things are far deeper and more serious than mere matters of bookkeeping.

They are not the result of a simple change or substitution of "dates."

When properly applied, we have no quarrel with the Commission when it states: "The substitution of dates is merely a bookkeeping arrangement" (85 I. C. C. 395, 399).

This is a labor-saving accounting device, and works out all right when rightly applied.

It is rightly applied, and can only be rightly applied, with respect to dumping by the *same* shipper.

It has no application to the operations of numerous shippers in a pool—tenants-in-common.

The tariff itself distinctly confines substitution of "dates" to cars delivered *"on shipper's order"* (R. p. 16).

All the courts hold that substitution of "dates" relates only and solely to cars of the "same consignee."

In the Pan Handle case, 143 Va. 865, 873, after quoting the passage relating to substitution of "dates," from N. & W. tariff I. C. C. 2828-B (R. 15-16), the Court says:

> "* * * the substitution here provided for relates to cars of the same consignee" (143 Va. 865, 873).

The Circuit Court of Appeals for the Third Circuit, in the case at bar, says:

> "It will be remembered that rule 3(b)2 of the demurrage tariff, quoted supra, allowed a substitution of a car of a shipper of later arrival for one of earlier arrival at the point of trans-shipment, and by the agreement of the members of the Exchange, a further substitution of the car of one member for that of another was permitted" (R. p. 177).
> *Emmons Coal Min. Co.* v. *N. & W. Ry. Co.*, 3 F. (2d) 525, 527.

The attempt to apply a tariff rule applicable only and solely to the *"same* consignee"—a single indi-

vidual—to numerous shippers belonging to a pool as tenants-in-common, something not covered by the tariff, and never contemplated by it, is disastrous and fatal to shippers in a pool.

The tariff does not say a word about substitution of "cars," as stated by the Court of Appeals in the above quoted passage. It does, however, provide for a substitution of "dates."

A most important and seriously different thing.

Substitution of "dates" in the case of the "*same* consignee"—a single individual—leaves another car actually standing on the yards in place of the one dumped.

Substitution of "dates" in connection with the operation of numerous shippers in a pool as tenants in common, does not leave another car standing on the yards in place of the car dumped.

The car is rolling from Bluefield and does not reach Norfolk terminals for a period of from four to twelve days.

Of course, if the demurrage account is kept by the railroad with the "pool" as a "single shipper," and the substitution of "dates" is confined to cars actually on the yards, and "releases" made on a car against car basis and not on a car against "equivalent tonnage" basis, there is always a car left standing on the yards in place of the one dumped.

This method was employed by every railroad except the Norfolk & Western.

It was employed in the Newport News Coal Exchange by the Chesapeake & Ohio Railroad; in the Sewell's Point Coal Exchange by the Virginian Railway Company; in the Tidewater Coal Exchange by the Baltimore & Ohio Railroad Company.

As we have already pointed out, the bookkeeping methods of Norfolk & Western Railway were entirely different from every other railroad operating a coal pool, and it alone did not employ the method of keeping the demurrage account with the "pool" as a "single shipper," as was the practice of every other railroad.

With respect to the theory of continuing to charge demurrage on the railway books until "equivalent tonnage was actually delivered," we wish to note that the unit of demurrage charges is always "the single car" (*Kittaning case*, 253 U. S. 319, 324).

One hundred tons may be dumped from a single car of 100 tons capacity. The demurrage charge is $2.00 per day per car.

One hundred tons—"equivalent tonnage"—may be dumped from two cars each of 50 tons capacity. The demurrage charge is then $2.00 per day for each car, or $4.00 per day for the two cars, although containing "equivalent tonnage."

Tonnage and demurrage charges do not balance, and cannot be balanced.

This fallacious theory has resulted in erroneous demurrage charges to these shippers.

It is very plain that if 100 tons contained in two cars of 50 tons capacity each are dumped, and 100 tons "equivalent tonnage" are "released" on the demurrage account contained in one car, of earlier arrival, of 100 tons capacity, only one car is "released," whereas two cars were dumped, and only the one car "released" on the accounts, is left standing.

So that, it is not true that there is always a car left standing on the yards in place of a car that was

dumped. Two cars may be dumped, and only one car of "equivalent tonnage" left standing.

This actually happened every day, and many times a day, in practice.

When applied to the average ship's cargo of 5,000 tons, it happened daily, and many times daily, and the error assumed serious proportions.

This is readily seen. For example, a pool member dumps 5,000 tons from 100 cars of 50 tons capacity each. The coal clerk's office, in making out the demurrage bill, charges off 5,000 tons, "equivalent tonnage," contained in 50 cars of 100 tons capacity each, and "releases" only 50 cars, although 100 cars have been actually dumped.

So that, it is not true that there is always a car left standing in place of the car that was dumped.

In this example, which was of daily occurrence, 100 cars were dumped and only 50 cars left standing after "release" on the demurrage record.

The demurrage charges of $2 per day per car go on increasing, on the 100 cars dumped; that is, at the rate of $200.00 per day, although only 50 cars are left standing in place of the 100 cars dumped.

An actual example is furnished by the Virginian Railway.

The Virginian had some cars of 120 tons capacity and desired to charge demurrage on the "equivalent tonnage" theory.

They thought it only fair to charge $4.00 per day demurrage, when 120 tons were dumped from one of these large cars, because if "equivalent tonnage" was dumped from two cars of 60 tons capacity each, the demurrage charge would be $2.00 per day per car, or $4.00 per day for the two cars.

This railway applied to the Commission to be allowed to make the extra demurrage charge on each 120-ton car.

The Navy Department filed objections, contending that the unit of demurrage charges was "the single car," irrespective of capacity.

Upon further consideration, the Virginian Railway saw the light, and withdrew its application, and has ever since continued to assess demurrage on "the single car" basis, irrespective of capacity; and when a car is dumped another car is actually left standing on the yards in its place.

It is car for car, and not car for tonnage.

Every other railroad does this except the Norfolk & Western.

It is unnecessary to point out that this "equivalent tonnage" theory produces serious errors and excess charges, in addition to the fallacious feature of assessing demurrage against tonnage in transit, producing demurrage charges for "detention that does not in fact exist" (85 I. C. C. 400).

We have already seen that the Norfolk & Western was the only railroad operating a pool, which did not keep its demurrage accounts against the pool as a single shipper, which is the only correct way of keeping an account with a pool.

At pages 362 and 363 of the transcript of the testimony taken before the Interstate Commerce Commission in the case of *Smokeless Fuel Co.* v. *N. & W. Ry Co.*, I. C. C. Docket 13281, Mr. Conrad, one of the principal witnesses for the Railway, testified that during the entire time of the operation of the Lambert's Point Exchange,—that is from June, 1920, to December, 1921, inclusive,—the demurrage bills

amounted to $699,000.00 for all shippers. (pp. 362-364).

He also testified that if the accounts had been kept against the pool,—each pool as a single shipper,—this amount would have been reduced by $250,000.00.

This gives some idea of the enormity of the crucifying injustice to which these shippers have been subjected by this fallacious and fanciful theory of the railway, creating and operating a pool and at the same time ignoring its nature and effect.

The common law duty of a railroad is to deliver cars in the order of arrival.

In *Smokeless Fuel Co.* v. *C. & O. Ry. Co.*, 34 Va. App. 192, 203, in speaking of the Tariff before it in that case, the Court said:

> "Clause (1) of Rule 3(b) plainly refers to the common law duty to dump in the order of arrival." (34 Va. App. 192, 203).

In the case of *Granger* v. *Davis*, 2 F. (2d) 695, 698, the Circuit Court of Appeals for the 6th Circuit held that it was the common law duty of the railway to dump cars in the order of arrival.

In the case of *Lehigh Silk Dyeing Co.* v. *Director General*, 77 I. C. C. 39, the syllabus reads:

> "Demurrage charges at Allentown, Pa., on certain interstate shipments of bituminous coal found not unreasonable or otherwise unlawful, except insofar as they exceeded the charges which would have accrued if the shipments had been placed in the order of their arrival. Refund directed and complaint dismissed."

Lehigh Silk Dyeing Co. v. *Director General*, 77 I. C. C. 39.

The Norfolk and Western Railway, in the case at bar, recognizes its common law obligations to deliver cars in order of arrival,—the earliest arrived car to be first delivered or dumped.

But, where thousands and thousands of cars were being handled, as was the case at Lambert's Point, the expense of switching cars out in order of arrival would run into hundreds of thousands of dollars. To save itself this expense, and to expedite the movement of cars, the Railway inserted in its Tariff, Rule 3 (b) 2, (R. 16), which reads in part as follows:

> "2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal," etc.

It thereupon proceeded to dump cars from the pool, irrespective of the order of arrival, and irrespective of "their proprietary identity"—to again use the phrase of Judge Learned Hand—and thus saved itself hundreds of thousands of dollars in expenses, and gained the benefit of expeditious handling of cars, coal and vessels.

But, when it came to keeping its demurrage books and accounts, it took away from the shipper all benefits of the pool by not keeping its demurrage accounts with the pool as a single shipper, which is the only correct way of keeping a demurrage account with a pool, and which method was employed by every other railway operating a pool except the Norfolk and Western.

In other words, it operated the cars and coal, physically, as a pool, and exempted itself to use its

own words, from its common law duty to deliver cars "in actual sequence of arrival," saved itself hundreds of thousands of dollars, and then immediately proceeded to ignore the existence, nature and effect of the pool on its demurrage accounts, insofar as the shipper was concerned.

Thus, by this erroneous and fantastic conception, it assessed demurrage against these shippers in the sum of $250,000.00 in excess of what the demurrage charges would have been if the accounts had been kept so as to reflect the basic fact of the existence of the pool, which it was actually operating daily in the physical handling of the cars and the coal.

It is interesting to note that Exchange Rule 31 (R. 25) for assessing "car demurrage," which was not filed with the Commission, provides: "Detention will be computed by subtracting the date of arrival of cars shipped from the date of release of *equivalent cars.*"

This is right, and if it had been applied, the demurrage would have been assessed on the correct demurrage unit of "the single car."

But the tariff rule, 3(b)2 (R. 16), which was used, provides: "The dates on which cars should have been released (as indicated by the record) will be substituted for the dates on which *equivalent tonage* was actually delivered."

A very different, wholly erroneous, unreasonable and impossible thing.

Single cars of varying capacity cannot be balanced against tonnage, and, as we have seen above, it frequently happened, and inevitably happened, that no car was left actually standing in place of

the one dumped, and demurrage was assessed for detention that did not in fact exist.

In passing, we desire to comment upon this curious thing:

The so-called "substitution clause of the Coal Exchange rules" (R. 21, Exchange Rule 15) was used by the Commission and the courts, although not on file with the Commission and not published.

If this unpublished rule of the Coal Exchange could be used, it is difficult to perceive why Exchange Rule 31 (R. 25), as to "*equivalent cars*" should not be used.

We contend no rule of the Exchange could be used, because not on file with the Commission and not published according to law.

But if they are to be used *vi et armis* we prefer the car for car rule of the Exchange signed and agreed to by the shippers rather than the "equivalent tonnage" rule of the tariff.

We will later deal fully with this so-called "substitution clause of the Coal Exchange rules," and will show it does not contain anything about "substitution" at all.

III.

Tariff Authorizes Demurrage Charges for Detention Only. Demurrage Assessed "For Detention that Does Not in Fact Exist" Found as Fact by Commission and All Lower Courts; Also Admitted by Railway.

This Lambert's Point Coal Exchange, which was formed by the Norfolk & Western Railway Company, as the Commission states in the *Smokeless Fuel Case*, 85 I. C. C. 395, 396, differs in important particulars from all other coal exchanges; one important difference being that when coal passed Bluefield, West Virginia, the "billing point," 359 miles from Lambert's Point, it would be credited on the books of the Exchange to the account of the member, and he would then be entitled to dump out of the pool coal already at Lambert's Point, not in excess of his total credits in the pool on the books of the Exchange (R. p. 115; Exchange Rule 15).

As the Commission and all the lower courts have decided, this inevitably resulted in assessing demurrage charges on cars "for detention that does not in fact exist" (85 I. C. C. 400).

We cite a passage from the decision of the Interstate Commerce Commission in the case of *Smokeless Fuel Co.* v. *Norfolk & Western Ry. Co.*, 85 I. C. C. 395, finding the fact to be that demurrage was charged notwithstanding there was no actual detention of cars:

> "Let us assume that only two members, A and B, belonged to the pool. On July 1, A received 50 cars which were credited to his account; B

had no cars in the pool. On July 5, 50 cars passed Bluefield, consigned to B and were then entered to his credit in the pool, although they did not reach Lambert Point for several days. On the same day, July 5, a vessel registered for B's coal. Under the pooling arrangement in connection with the substitution rule of the tariff, A's coal was substituted for B's and immediately unloaded into B's *vessel. It will be seen that, until the the arrival of B's cars, no equipment was, in fact, detained at the port,* but nevertheles, demurrage continued to be assessed against A on account of the 50 cars standing to his credit and represented by B's cars in transit.

"Defendant contends that such an illustration is wholly theoretical and that, as a matter of fact, a dry pool, so called, never actually existed. But a dry pool is not necessary to such constructive detention, *for whenever demurrage is assessed against cars actually unloaded on credits based on coal in transit, such demurrage is assessed for detention that does not, in fact, exist until the cars arrive at the port.*" (Italics ours.)

Smokeless Fuel Co. v. *N. & W. Ry. Co.*, 85 I. C. C. 395, 400.

The fact that demurrage is charged to the shipper upon cars not under actual detention, is also clearly found by the Circuit Court of Appeals for the Third Circuit in *Emmons Coal Mining Co.* v. *N. & W. Ry. Co.*, 3 Fed. (2d) 525. That Court said:

"(6) The defendants (below) have attacked the tariff upon which the claim of the railroad company is based, and the practice of the railroad company thereunder from still another angle. It will be remembered that the coal ship-

ped by each member of the coal exchange was credited to him in the exchange when it passed Bluefield, W. Va., and after being so credited, he was entitled to at once order the withdrawal of an equal amount of coal from the exchange, although his own coal would not actually be delivered at Lambert's Point for several days. This arrangement was made possible by the substitution clause of the coal exchange rules. *The defendants have pointed out that this practice enabled the railroad company to charge demurrage, although no actual detention of its equipment beyond the free time had actually occurred. It is true that, when a shipper exercised his right to order an equal amount of coal out of the pool as soon as his own coal had passed Bluefield, his order released cars in the Lambert's Point yard containing coal of another member of the exchange, and there was no actual detention of equipment while his own cars were in transit to Lambert's Point.*" (Italics ours.) *Emmons Coal Min. Co.* v. *N. & W. Ry. Co.*, 3 Fed. (2d) 525, 528-529.

The Norfolk and Western Railway admitted that charges were made "for detention that does not, in fact, exist."

At page 400, 85 I. C. C., the Commission states that the Norfolk and Western computed that in a period of six months there were 8,778 days on which demurrage was charged on cars where there was no detention in fact—all growing out of the peculiar rule of the Lambert's Point Coal Exchange permitting unloading "on credits based on coal in transit." (85 I. C. C. 400). At $2.00 per day, this amounts to $17,556.00, not a negligible sum by any means.

In the testimony taken before the Commission in

this case—*Smokeless Fuel Co.* v. *N. & W. Ry. Co.*, I. C. C. Docket 13281,—it appears that there was never a car standing at the terminals in place of the one dumped against tonnage in transit from Bluefield.

At page 239 of the stenographic notes of the testimony taken before the Commission, in discussing an example of 100 cars passing Bluefield, Counsel for Norfolk and Western, Mr. Rivinus, put the following question to Mr. Gutheim, principal witness for the Railway:

> "Q. And always the railroad had a hundred cars in its hands, although they may not be at the Tidewater Terminal?
> "A. Oh yes."

A demurrage tariff expressly providing charges for detention only, on cars which have "arrived", and are "held", "at Norfolk Terminals", is no authority for the conception that "always the railroad has a hundred cars in its hands, although they may not be at the Tidewater Terminal" and that demurrage may be assessed accordingly.

So we have the Commission, and all the lower courts, finding as a fact, and the Norfolk and Western Company itself admitting, that demurrage charges were assessed "for detention that does not, in fact, exist."

This fact is unanimously found and admitted.

Norfolk and Western demurrage tariff, I. C. C. 2828-B, provides only and solely for the assessment of demurrage charges on account of detention of cars. It does not provide anywhere for the assessment of one cent demurrage unless there has been actual detention of cars.

By reference to Norfolk and Western tariff I. C. C. 2828-B (R. 15-16), printed as Appendix "B" hereto, it is seen that in large black type the opening sentence states in express words that:

This tariff governs "cars * * * *at* Norfolk and Lambert's Point, Va."

Immediately below this sentence, we find the following, also in large black type:

"Rule 1. Cars Subject to Rules."

Then follows:

> "Cars containing anthracite coal, bituminous coal, coal briquets or coke, for trans-shipment direct to vessels either cargo or fuel supply or to be stored for shipment by vessels when *held* for or by consignors or consignees for unloading, forwarding directions, or for any other purpose, are subject to these rules, * * *."

The use of the word "held" should be noted. Unless the cars are "*held*," and unless they are "*at* Norfolk Terminals," the tariff expressly and obviously does not apply.

In a Note published in the tariff, Norfolk Terminals are defined as consisting of a system of main and connecting side tracks extending from Mile Post 8, at the western boundary of said terminals, to the piers and tracks adjacent at Lambert's Point.

This Note states: "Coal, coal briquets or coke for delivery to vessels *held in cars on tracks within the boundaries of Norfolk terminals* is available for delivery to the piers upon customary notice of owner."

It will be observed that the phrase used is: Coal, etc., "*held* in cars on tracks within the boundaries of Norfolk terminals * * *."

The tariff expressly applies only to cars "*held* * * * within the boundaries of Norfolk terminals."

Rule 2 of the Tariff explains "free time allowed."

Rule 3 of the Tariff applies to "computing time." Beginning "from the first 7 A. M. after the day on which notice of *arrival* is sent or given." No demurrage is assessable, prior to "arrival" at Norfolk Terminals.

Rule 4 of the Tariff is entitled "Demurrage Charges," and explains how same are to be computed.

As the Commission says, this rule provides a "monthly period for adjusting debits and credits." (58 I. C. C. 34). To same effect see *Kittaning case*, 253 U. S. 319, 324.

There is not a word in the tariff, other than with reference to cars "held" or detained "at Norfolk Terminals."

There is not a word in the tariff authorizing the assessment of demurrage "against cars actually unloaded on credits based on coal in transit." (85 I. C. C. 395, 400.)

There is not a word in the tariff authorizing the assessment of demurrage "for detention that does not, in fact, exist." (85 I. C. C. 395, 400.)

But, demurrage was assessed "for detention that does not, in fact, exist."

This has been unanimously found, as a fact, by the Commission and all the lower courts, and has been admitted by Norfolk and Western Railway Company.

Demurrage charges "for detention that does not, in fact, exist" (85 I. C. C. 395, 400) has been adjudged to be due and payable by these shippers.

Yet, there is no tariff authority for same.

The law that no charges can be made or collected, and that no service can be rendered without specific tariff authority, is plain, and it has been so decided in almost innumerable cases by this Court.

These cases have never been overruled, and cannot be ignored.

The point we are now making is with respect to the illegality of the charge, and not with respect to its reasonableness, although we may say in passing that we deny the reasonableness of a demurrage charge imposed for no detention, in fact, and will deal with that subject later, claiming that it is a taking of property without due process of law, and is confiscatory.

> "* * * A charge may be perfectly reasonable under Section 1, yet may create an unjust discrimination or an unreasonable preference under Sections 2 and 3."
> *I. C. C.* v. *B & O. R. R. Co.*, 145 U. S. 263; 36 L. ed. 699, 704.
> *American Express Co.* v. *Caldwell*, 244 U. S. 617; 61 L. ed. 1352.
> *U. S.* v. *I. C. R. Co.*, 263 U. S. 315; 68 L. ed. 417.

So charges may be perfectly reasonable under Section 1, and yet be unlawful under Section 6 of the Commerce Act, because, in the language of the Act, they are not "charges which are specified in the tariff filed and in effect at the time" (41 Stat. L. 483).

Unless a charge is "specified in the tariff filed," it cannot be made at all. The law forbids it, under penalty of fine or imprisonment, or both, in the discretion of the Court.

Norfolk & Western Tariff I. C. C. 2828-B provides for demurrage charges in cases where cars have been detained beyond the free time. It does not provide for demurrage charges where there has been no detention.

In a Note * below, we print paragraph 7, Section 6, Transportation Act, 1920 (Act to Regulate Commerce).

In the case of *Davis* v. *Henderson*, 266 U. S. 92, 69 L. ed. 182, it is held that where the tariff provides for a *written notice* given by a shipper, to have a

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* Note: "No *carrier*, unless otherwise provided by this Act, *shall engage or participate in the transportation of passengers or property*, as defined in this Act, *unless the rates, fares, and charges* upon which the same are transported by said carrier *have been filed and published in accordance with the provisions of this Act;* nor shall any carrier *charge or demand or collect or receive a greater or less or different compensation* for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs *than the rates, fares, and charges which are specified in the tariff filed and in effect at the time;* nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges, so specified, *nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: Provided*, That wherever the word 'carrier' occurs in this Act, it shall be held to mean 'common carrier'' (24 Stat. L. 381, as amended by 25 Stat. L. 856, 34 Stat. L. 587, 41 Stat. L. 483)." (Italics ours.)

4 Fed. Stat. Ann. (2d ed.) 421.

car furnished within a reasonable time, no car can be furnished upon an *oral notice*, although it had been the custom for a long time.

In the case of *Davis* v. *Cornwell*, 264 U. S. 560, 68 L. ed. 848, it is held that in the absence of a provision in the tariff that a shipper may order a car to be furnished for loading on a day certain, no such car can be furnished.

In the case of *C. & O. R. Co.* v. *Westinghouse, Church, Kerr & Co.*, 270 U. S. 260, it is held that in the absence of tariff authority providing for the furnishing of a switching engine and crew, the railroad could collect nothing for the same.

In the case of *Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 60 L. ed. 836, it is said:

> "No carrier may extend any 'privileges or facilities' save as they are duly specified."

In the case of *Southern Ry Co.* v. *Reid*, 222 U. S. 425, 56 L. ed. 257, it is held that in the absence of a tariff providing a rate for the shipment of furniture from a point in one state to another state, no such service can be rendered.

In the case of *Moore Stave Co.* v. *Morgan's L & T. R. R. & S. S. Co.*, 41 I. C. C. 472, 473, the Commission says:

> "Under the provisions of Section 6 of the Act, all terminal privileges and facilities extended to shippers must be specifically authorized by tariff and cannot be inferred" (41 I. C. C. 472, 473).

In the case of *United States* v. *Illinois Central Terminal Co.*, 168 Fed. 546, a railroad was fined

twelve thousand dollars for hauling and switching 6 carloads of glass bottles without having any tariff in effect covering the transaction.

In the case of *C. & A. R. Co.*, v. *Kirby*, 225 U. S. 155, 56 L. ed. 1033, it is held that, in the absence of a clause in the tariff providing for a special fast train, none can be furnished, and that a contract previously made to furnish same, is void.

In this connection, it is obvious that the rules and agreements of the Coal Exchange, not being on file with the Commission, cannot be used in any way in computing demurrage.

Tariff rates and services cannot be changed by contract or agreement of any kind, whatsoever, not published.

In the case of *Southern Railway Co.* v. *Prescott*, 240 U. S. 633, 60 L. ed. 836, already referred to above, this Court says:

> "It is also clear that, with respect to the service governed by the Federal statute, the parties were not at liberty to alter the terms of the service as fixed by the Federal regulations. This has repeatedly been held, with respect to rates (*Texas & P. R. Co.* v. *Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, 652, 57 L. ed. 683, 668, 33 Sup. Ct. Rep. 391; *Boston & M. R. Co.* v. *Hooker*, 233 U. S. 97, 112, 58 L. ed. 868, 876, L. R. A. 1915B, 450, 34 Sup. Ct. Rep. 526, Ann. Cas. 1915D; *Louisville & N. R. Co.* v. *Maxwell*, 237 U. S. 94, 59 L. ed. 853, L. R. A. 1915E, 665, P. U. R. 1915C, 300, 35 Sup. Ct. Rep. 494), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the pur-

view of the Act. *Chicago & A. R. Co.* v. *Kirby*, 255 U. S. 155, 166, 56 L. ed. 1033, 1038, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Atchison, T. & S. F. R. Co.* v. *Robinson*, 233 U. S. 173, 181, 58 L. ed. 901, 905, 34 Sup. Ct. Rep. 546."
Southern Ry. Co. v. *Prescott*, 240 U. S. 632, 60 L. ed. 836, 839.

The amount is a matter of no importance whatever, whether it be great or small.

In the case of *Pittsburgh, C. C. & St. L. Ry. Co.* v. *Fink*, 250 U .S. 577, 63 L. ed. 1151, only fifteen dollars was involved.

Nevertheless, this Court held that it was a violation of the statute, not to pay this amount, which was prescribed by the tariff. And that a previous settlement by the consignee for a less amount, upon an erroneous bill presented by the railroad, could not prevent the collection of the $15 additional; and that neither the railroad nor the consignee could, by consent, change the exact amount due under the the tariff.

In the case of *Turner, etc., Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259, only Forty Dollars ($40) was involved.

The statute provides that the charges collected must be no "greater or less, or different," than the rate prescribed in the tariff.

Parties, Commissions or Courts, are powerless to make any dispensation whatsoever.

IV.

Demurrage Not Recoverable Because Accounts of Railway Were Kept in Such Manner as to Make It Impossible to Show Exact Amount Due, if Anything Was Due.

We have seen that the Commission and all the lower courts have decided that demurage charges have been assessed "for detention that does not in fact exist."

We have seen that Norfolk and Western Railway Co. has admitted this fact to be true.

In the Judgment in the case at bar are included demurrage charges "for detention that does not in fact exist."

Such demurrage charges are illegal and cannot be collected.

It was incumbent upon the Railway Company to prove the exact amount due to it, if anything was due, so that the Court could enter judgment for an amount certain, without the inclusion of illegal and non-collectible charges.

The confessed and adjudged inclusion of illegal and non-collectible items in the total amount claimed, renders it impossible for the Court to know what amount, if any, is due by Emmons Company to the Railway Company, and to give judgment therefor.

Therefore, the judgment is erroneous and invalid.

In the case of *Virginian Ry. Co.* v. *Lake Export Coal Corp.*, 5 Fed. (2d) 496, the Circuit Court of Appeals for the Fourth Circuit, in an opinion by Judge Rose, held that it was the duty of the Railroad Company to show the exact amount due for de-

murrage, and that if its accounts were kept in such manner that this could not be done, it was the fault of the Railway, and no judgment could be recovered against the shipper.

V.

Substitution of "Dates." Tariff Applies to "Same Consignee," Not to Numerous Members of a Pool. Exchange Rules Contain Nothing About Substitution at All.

A great deal was said by the Commission and by the courts below as to the matter of substitution.

> "Around this power of substitution centers the main controversy of the instant case."
>
> *Emmons Coal Min. Co.* v. *N. & W. Ry. Co.*, 3 F. (2d) 525, 527; (R. 177).

We have already seen that the pool members were tenants-in-common in a mass of fungibles and that each member partitioned his own coal from the pool, and dumped his own coal, and there was no substitution.

We have already seen that Norfolk & Western tariff I. C. C. 2828-B applies only to "the same consignee" (143 Va. 865, C. C. A. 3rd Circuit 3 F. (2d) 525, 527; (R. 177); and that the tariff itself distinctly confines substitution of "dates" to cars delivered "on shipper's order." (R. 16). The tariff has no application whatsoever to operations of a pool, composed of numerous shippers.

In addition to applying only to "*the same consignee,*" it fails to contain specific authority for performing the service of a pool.

Wherefore, the Commission and all the courts resorted to the so-called "substitution clause of the Coal Exchange rules."

The Circuit Court of Appeals for the Third Circuit says:

> "It wil be remembered that the coal shipped by each member of the Coal Exchange was credited to him in the Exchange when it passed Bluefield, West Virginia, and after being so credited, he was entitled to at once order the withdrawal of an equal amount of coal from the Exchange, although his own coal would not actually be delivered at Lamberts Point for several days. *This arrangement was made possible by the substitution clause of the Coal Exchange rules.* The defendants have pointed out that this practice enabled the railroad company to charge demurrage, although no actual detention of its equipment beyond the free time had actually occurred. It is true that when a shipper exercised his right to order an equal amount of coal out of the pool as soon as his own coal had passed Bluefield, his order released cars in the Lamberts Point yard, containing coal of another member of the Exchange, and there was no actual detention of equipment while his own cars were in transit to Lamberts Point." (Italics ours.)

Emmons Coal Min. Co. v. *N. & W. Ry. Co.*, 3 Fed. (2d) 525, 528-529; (R. 179).

Rule 15 of the Exchange (R. 21) is the rule providing for members receiving credit on the books of the Exchange, for tonnage as it passes the billing point, Bluefield, West Virginia, and is the rule referred to by the Court in the above quoted passage from its opinion. We print this Rule in a Note below.*

It will be observed that there is a total absence of any "substitution clause of the coal exchange rules."

We have not overlooked the borrow and loan clause of this Rule 15.

If that clause was in the mind of the lower courts, as authorizing "substitution" of "coal" or of "cars" or of "dates", there is nothing in it to support the idea.

Because, all the pool members, the moment they pooled their coal as it passed Bluefield, became tenants-in-common in this mass of fungibles, and had no separate, ear marked quantity of coal which any of them could borrow from, or lend to, the other.

Each had his "aliquot share in the whole pool dependent upon his proportion of the whole." (284 Fed. 287, 290).

Lending or borrowing $1,000 or anything else, involves no substitution. When a loan is secured, the papers usually expressly provide for substitution of collateral.

In making a loan, a note is usually taken as evidence of a promise to repay the loan. The note is not substituted for the loan.

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* Note:—"15. Coal will be taken into the records of the Exchange daily as it passes billing points. Members shall be entitled to receive coal from a classification on their orders according to priority of vessel register, but no orders for delivery of coal will be executed in excess of the tonnage standing in the name of a member on the Exchange records. Members, however, may enter into borrow and loan transactions as may be mutually advantageous to themselves, and the Manager shall at all times be available to act as an intermediary in such transactions to the extent he may be authorized by individual members." (R. 21.)

This Exchange Rule 15 does not mention the word "substitution".

It does not mention the word "car".

It does not mention the word "date".

There is nothing about any of these things in the Rule.

The total absence of any "substitution clause of the coal exchange rules" furnishes no authority for substitution.

Hence, even if these Coal Exchange rules had been on file with the Commission—which they were not—they would have furnished no authority for substitution of any kind.

If there is anything in the idea of the Court of Appeals that a demurrage tariff can be changed by agreement, or added to in any way by agreement contained in the Exchange Rules not on file with the Commission, then we beg to point out that the agreement which the shippers were required to sign, under Rule 17 of the Exchange (R. 22), expressly provides for "release of equivalent cars" and not for "equivalent tonnage", as stated in the tariff.

In other words, the agreement was not as to "equivalent tonnage."

The minds of the parties never met on that point, but the agreement was for "release of equivalent cars".

Of course, our position is that the Exchange Rules, not being on file with the Commission, could not be used for any purpose whatsoever, and especially for the purpose of changing or adding to the terms of the published tariffs.

We waive the point that the Railway after forcing the shipper to sign and agree to Rule 17 of the Ex-

change (R. 22) expressly providing for "release of equivalent cars," may have deceitfully and fraudulently published its tariff on the "equivalent tonnage" basis.

This comment is not made in a spirit of smallness, but is justified in law.

Nevertheless, we think the truth is, that the operating department of this railway, which frames tariffs as to demurrage and the handling of cars, is not informed or educated with respect to the law, and the framing of instruments, and perhaps unintentionally did this contradictory thing.

If it was done intentionally it is fraud and deceit. If unintentionally it is lack of knowledge in the drafting of instruments.

At all events the result and effect of the manner in which the instruments are drawn is disastrous and destructive to these shippers.

These Coal Exchange rules provide for classification of coal going into the various pools, and the keeping of tonnage debits and credits of the various members on the books of the Exchange. They do not purport to keep, and it was never contemplated, that these Exchange books should keep a demurrage account as to cars, and the substitution thereof; and they do not keep any such accounts.

It is unnecessary to say that these Exchange books are different from the railroad books containing the accounts as to demurrage.

Furthermore, it is an impossibility to balance tonnage against demurrage. The unit of demurrage charges is always "the single car." (*Kittaning case*, 253 U. S. 319, 394; 64 L. ed. 928, 930.)

In the case at bar, it is confessed by the railway

that demurrage was not assessed on the basis of "the single car", as required by the decisions of this Court. It is confessed that the demurrage charges and accounts are wrong, in that they are not in accordance with the ruling of this Court, but directly in the teeth of it.

It is confessed that upon the fallacious theory of the railway in creating and operating a pool, and then ignoring its existence and effect, it would be impossible to compute demurrage on the true basis of "the single car". In the testimony taken before the Commission in this case, *Smokeless Fuel Co.* v. *N. & W. Ry. Co.*, I. C. C. Docket 13281, the following appears at pages 234 and 235 of the stenographic notes, and is given by the principal witness for the railway, Mr. Gutheim:

> "Q. (By Mr. Rivinus) Mr. Gutheim, there are one or two additional questions I would like to develop here. Assuming the existence of coal pooling and individual personal liability for demurrage, would it be practicable to assess demurrage on any basis of individual cars?
>
> "A. Not if you are going to operate a pool for the purpose of accomplishing what I believe it is for, and that is a prompt release of cars and minimum switching, because that necessarily involves the handling of cars from the yard to the pier into the vessel out of order."

This testimony, although not in the Record, shows what we have already demonstrated from the Record:—

That demurrage was assessed in the case at bar on the "equivalent tonnage" basis, and not on "the single car" basis.

The demurrage assessed is confessedly wrong.

This testimony also shows what we have already demonstrated from the Record, that is to say, the self-evident impossibility of balancing tonnage against cars, the unit of a demurrage charge being "the single car".

Cars are of different capacities—they may be respectively of 40 tons, 50 tons or 100 tons capacity—yet the demurrage charge is $2 per day per car, irrespective of car capacity.

A member may dump 100 tons of coal contained in a single car of 100 tons capacity. The demurrage charge is $2 per day per car, or $2.00 in all for one day's detention.

He may later dump "equivalent tonnage", to wit, 100 tons, contained in *two* cars of 50 tons capacity each.

The demurrage charge is $2 per day per car, or, in that case, $4.00 in all for one day's detention.

It is impossible, therefore, to balance tonnage against demurrage, the latter being always calculated on the unit of "the single car."

The Exchange books deal with coal tonnage; the railway demurrage accounts deal with car detention.

The two things are incompatible and will not mix, any more than oil and water.

VI.

Conclusions of Law Contradict Findings of Fact. All Demurrage Charged for no Detention, Confiscatory and Unconstitutional. Unconstitutional to Inflict Penalty for no Offense.

The Commission and all the lower courts have asserted that the demurrage charges in these cases were assessed in accordance with the tariff, and that demurrage charges for no detention in fact, are reasonable.

This conclusion of law is contradicted by the findings of fact.

We have seen that Norfolk & Western demurrage tariff I. C. C. 2828B provides demurrage charges for car detention only.

We have seen that the Commission and all the courts below have unanimously held as a fact that demurrage was assesed "for detention that does not in fact exist." (85 I. C. C. 395, 400).

In the case of *United States* v. *N. Y. Central R. Co.*, 263 U. S. 603, 68 L. ed. 471, it was held by this Court that the conclusion of the Commission that the reduced rate fixed by it for interchangeable mileage tickets, was just and reasonable, was contradicted by its findings of fact, and therefore the conclusion of the Commission became one of law and was not binding on the Court.

In *Great Northern Ry Co.* v. *Minnesota*, 238 U. S. 340, 59 L. ed. 1337, and in *Union Pacific R. Co.* v. *Public Service Comm.*, 248 U. S. 67, 63 L. ed. 131, this Court reversed the judgments of the lower courts as a matter of law, on the facts found by the Commission.

In the case of *I. C. C.* v. *B. & O. R. R. Co.*, 225 U. S. 326, 56 L. ed. 1107, it was held that where the facts are undisputed, and the conclusions of the Commission are challenged, a question of law is raised.

The charging of demurrage where there is no detention, is confiscation, and contrary to the 14th Amendment.

In *Davison* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616, it was held that a statute declaring in terms, without more, that the full and exclusive title to a prescribed piece of land belonging to one person should be, and is hereby, vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th Amendment.

We respectfully submit that a judgment taking away the money and property of shippers for demurrage charges on cars where there has been no detention in fact, is a transfer of money and property of the shipper to the railroad without any compensation to the shipper whatsoever, and without any benefit to the shipper whatsoever, by which he is not only deprived of a fair return on his money and property, but is actually deprived of the money and property itself *in toto*. See also *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, and numerous cases cited therein.

Furthermore, it is unreasonable, unconstitutional, and not due process of law, to inflict a penalty, when no offense has been committed.

Demurrage is a penalty imposed on account of undue detention of cars.

"The purpose of demurrage charges is to pro-

mote car efficiency by penalizing undue detention of cars." (*P. R. R. Co.* v. *Kittaning I. & S. Mfg. Co.*, 253 U. S. 319, 323, 64 L. ed. 928, 930.)

It has been frequently decided by the Interstate Commerce Commission that demurrage is a penalty, inflicted on account of undue detention of cars.

T. M. Kehoe & Co. v. *C. & W. C. R. Co.*, 11 I. C. C. 166;
Dashields & Co. v. *Director General*, 73 I. C. C. 225;
Hawkins & Sons v. *Director General*, 80 I. C. C. 225;
McGarry & Co. v. *Wabash R. R. Co.*, 88 I. C. C. 301.

Where the claim is made that a charge is confiscatory, there must be a fair opportunity for submitting that issue—

> "* * * to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment. Missouri P. R. Co. v. Tucker, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 660, 661, 59 L. ed. 405, 411; P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214; Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533, 538, 60 L. ed. 1148, 1154, 36 Sup. Ct. Rep. 715; Oklahoma Operating Co. v. Love (March 22, 1920), 252 U. S. 331, ante, 596, 40 Sup. Ct. Rep. 338."

Ohio Valley Water Co. v. *Ben Avon Boro.*, 253 U. S. 287, 289; 64 L. ed. 908, 914.

VII.

Sole Question Construction of Tariff. All Matters of Law Open, Even Though not Raised Below.

The sole question in the case at bar is the construction and application of the tariff. The construction of a tariff is a question of law for the Court. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 66 L. ed. 943.

Turner etc. Lumber Co. v. *C. M. & St. P. R. Co.*, 271 U. S. 259.

The assignment of errors raises clearly the question of the construction of the tariff, and this question has been pressed all through the case below.

Construction includes matters making an instrument void, and also matters involving the meaning of the phraseology employed.

All propositions of law are open under these assignments of error.

Herein we have advanced propositions of law, which were not brought to the atention of the Commission nor the lower courts.

We regret that these propositions of law were not presented before, and we believe if they had been presented below, the result would have been different. These shippers are victims of world wide calamity, the result of the greatest war in history.

New and additional counsel have been associated in this case very recently, and the situation is somewhat like that in the case of *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 63 L. ed. 1099.

In that case—as pointed out in the sole dissenting

opinion—for twenty-five years, parties had been represented "by counsel of great eminence" and only at the expiration of a quarter of a century did they hit upon the true theory of law governing the case; and this Court decided in an elaborate opinion that they were not barred by laches, and that they would be heard. Relief was granted them.

The matters of law now raised are open under the assignment of errors.

Furthermore, it has been frequently ruled by this Court that a plain error will be corrected, even without an assignment of error.

U. S. v. *Tennessee C. R. Co.*, 176 U. S. 242, 44 L. ed. 452;
U. S. v. *Pena*, 175 U. S. 500, 44 L. ed. 251;
Columbia Heights Realty Co. v. *Rudolph*, 217 U. S. 547, 54 L. ed. 877, citing numerous cases.

Current Rule 25 of this Court is to the same effect.

Delay in raising a point will not preclude decision on appeal. *Southern Pac. Co.* v. *Bogert*, 250 U. S. 483, 63 L. ed. 1099.

A particularly strong case is that of *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 30 L. ed. 825.

In that case, no reference had been made below to a statute of Rhode Island, which repealed and modified in some respects, the statutes upon which the parties relied below.

This Court held, not only that the point would be considered, but that it would take judicial notice of the statute which had not been referred to below.

VIII.

Judicial Notice.

The demurrage sued for in this case grew out of the failure of the shipper to unload on account of circumstances beyond his control.

All of these circumstances were the direct results of the World War and the financial and trade collapse of 1920-1921, and the disruption of foreign trade.

The court will take judicial notice of these matters and, indeed, the Act of Congress of August 24, 1921 (Fed. Stat. Ann. (2d) Supp. 1921, p. 27) specifically refers to the collapse of foreign trade in 1920-1921, being due to the World War.

We have already called attention to the fact that in the *Mayes case*, 201 U. S. 321, 50 L. ed. 772, which is the leading authority, this Court took judicial notice that conditions might arise which would make it impossible for a railroad to comply with the rigid requirements of the Texas statute, and we have already pointed out that the Supreme Court of Appeals of Virginia, in *Southern Railway Co.* v. *Commonwealth*, 107 Va. 771, 780, 60 S. E. 70, used the following language in this connection:

> The Texas statute " * * * was held invalid on the declared ground that exceptions were not made for cases which might occur, rendering the carrier unable to furnish cars within the time specified; but a careful examination of the printed record in that case fails to disclose any evidence of a washout or sudden congestion of traffic, or unavoidable detention of cars in other states, or in other places in the same state, or any other circumstances which the court de-

cleared should excuse the railroad company from furnishing cars applied for. In other words, the court took judicial notice of the fact that such conditions might arise, and for that reason the statute was 'likely' to do great injustice to the roads, * * *."

Southern Ry. Co. v. *Commonwealth*, 107 Va. 771, 780, 60 S. E. 70.

In a recent case, the Supreme Court of the United States used the following language, showing that the invalidity of a statute may be established by things which will be judicially noticed:

"Invalidity may be shown by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U. S. 59, 64, 56 L. ed. 350, 352, 32 Sup. Ct. Rep. 192), or by facts established by evidence."

Weaver v. *Palmer Bros. Co.*, Law Co-Op. Adv. Ops. U. S. Ct. 1925-1926, pp. 366, 367, 270 U. S. 402.

In the case of *Bluefield, etc. Co.* v. *Public Service Comm. of W. Va.*, 262 U. S. 679, 67 L. ed. 1176, the court uses the following language with respect to taking judicial notice of increased cost of labor and supplies, as a result of the World War—

"In 1919, this court in Lincoln Gas & E. L. Co. v. Lincoln, 250 U. S. 256, 268, 63 L. ed. 968, 976, 39 Sup. Ct. Rep. 454, declined on the facts in that case, to approve a finding that no rate yielding as much as 6 per cent on the invested capital could be regarded as confiscatory. Speaking for the court, Mr. Justice Pitney said:

> "'It is a matter of common knowledge that, owing principally to the World War, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.'"

Bluefield W. W. & Imp. Co. v. *Public Service Comm. of W. Va.*, 262 U. S. 679, 693-694; 67 L. ed. 1176, 1183.

Courts will take judicial notice of the existence of our Civil War, of acts of war which led to it, and of the general social and financial results which followed it. *Burke* v. *Miltenberger*, 19 Wall. 519, 22 L. ed. 158.

The courts will take judicial notice of orders of the Director General of Railroads, and of the Interstate Commerce Commission, under which, during the period between March 21, 1918, and February 29, 1920, the cost of railroad operations had enormously increased and the rates had been advanced in an effort to provide the increased cost. They take judicial notice, also, of the general change in conditions after February, 1920. *Michigan Cent. R. Co.* v. *Michigan Pub. Utilities Comm.*, 271 Fed. 319.

Courts will take judicial notice of executive proclamations, regulations of Bureaus and Departments, and Reports of Public Officers. *Armstrong* v. *United States*, 13 Wall. 154, 20 L. ed. 641.

Also of executive documents, printed by authority of the Federal Senate. *Whiton* v. *Albany Ins. Co.*, 109 Mass. 24.

Also, of official reports published by authority of the legislature. *Kirby* v. *Lewis*, 39 Fed. 66.

Also, of rules and regulations of the Land Department, as to the sale of public lands. *Cosmos Co.* v. *Gray Eagle Co.*, 190 U. S. 301, 47 L. ed. 1064.

> "It is a matter of common knowledge that agreements as to rates have been continuously made of late years between railroad companies, and that complaints of each company in regard to the violation of such agreements by its rivals, have been frequent and persistent."
> *U. S.* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 41 L. ed. 1007.

Wherefore, Emmons Coal Mining Company and The Fidelity and Casualty Company of New York pray that this Court will grant a rehearing in said case, No. 70, October Term, 1926, and set same down for reargument together with Pan Handle Coal Company Case No. 299, October Term, 1926, when same is reached for argument.

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THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By WILLIAM G. WRIGHT,
Attorney for The Fidelity and Casualty Company of New York.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Philadelphia, }

J. Grey Emmons, being duly sworn according to law, deposes and says that he is Secretary and Treasurer of the Emmons Coal Mining Company, a corporation created by and existing under the laws of Pennsylvania, and that he is duly authorized to render this affidavit in its behalf and on behalf of its co-defendant, The Fidelity and Casualty Company of New York; that he has read the foregoing petition for rehearing, and that the same is true to the best of his knowledge and belief.

J. GREY EMMONS.

Sworn to and subscribed before me this 3rd day of February, 1927.

BESSE KIPE,
Notary Public.

[SEAL]

My commission expires at end of next session of Senate.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

I, Claudian B. Northrop, Attorney for Emmons Coal Mining Company, do hereby certify that the foregoing petition for rehearing is meritorious, and that it is presented in good faith and not for delay.

CLAUDIAN B. NORTHROP,
Attorney for Emmons Coal Mining Co.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William G. Wright, Attorney for The Fidelity and Casualty Company of New York, do hereby certify that the foregoing petition for rehearing is meritorious, and that it is presented in good faith and not for delay.

WILLIAM G. WRIGHT,
Attorney for The Fidelity and Casualty Company of New York.

INTERVENTION (If Allowed).

Paul L. James and W. Willis Houston, partners trading as Pan-Handle Coal Company, respectfully show unto the Court that they are plaintiffs in error in No. 299, October Term, 1926, in the case entitled Paul L. James and W. Willis Houston, partners trading as *Pan-Handle Coal Company, plaintiffs in error,* v. *Norfolk and Western Railway Company.*

They respectfully show unto the Court that they have, on January 21, 1927, served notice on Attorneys of Record for defendant-in-error, that on Monday, February 7, 1927, or as soon thereafter as counsel can be heard, they will move the Court for leave to intervene in case No. 70, October Term, 1926, wherein Emmons Coal Mining Company, et al. are plaintiffs in error and Norfolk and Western Railway Company is defendant in error, and for leave to join in the petition for rehearing, requesting that cases 70 and 299, October Term, 1926, be argued together.

They respectfully show unto the Court, by their counsel of record, Thomas W. Shelton, Gibbs L. Baker and Claudian B. Northrop, that they hereby join in the foregoing Petition for Rehearing, requesting that

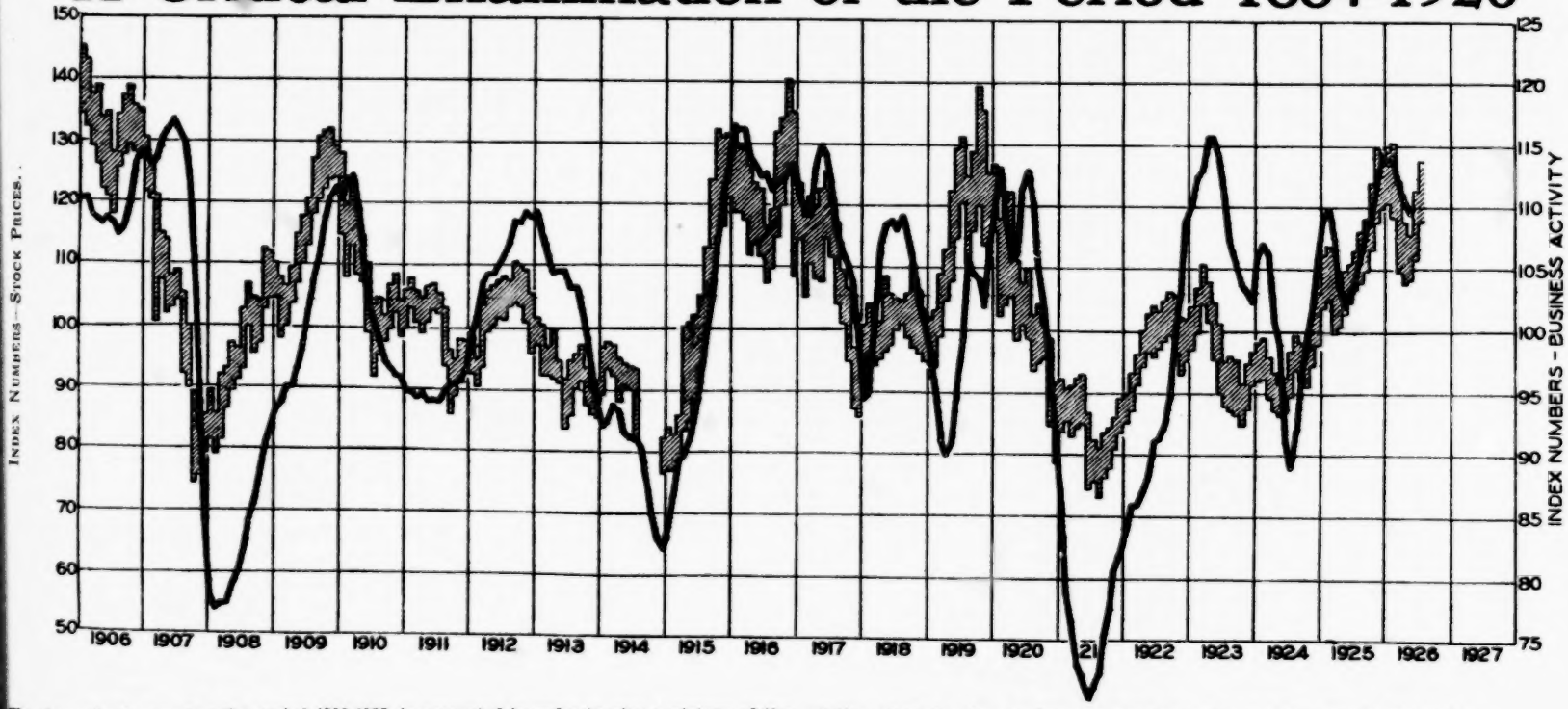
cases numbered 70 and 299 be heard and argued together, if this Court shall grant their Motion to Intervene, and join in the foregoing Petition.

PAUL L. JAMES AND W. WILLIS HOUSTON,
Partners trading as
PAN HANDLE COAL COMPANY,
By THOMAS W. SHELTON,
GIBBS L. BAKER,
CLAUDIAN B. NORTHROP.
Attorneys for Pan Handle Coal Company.

APPENDIX A.

(Published by New York Times Co.)

A Critical Examination of the Period 1884-1926



The above chart, covering the period 1906-1926, is presented in order to give a picture of the relation of stock prices to business activity over the entire period 1884-1936.

No Supplement to this Tariff will be issued except for the purpose of cancelling the tariff.

TARIFF C. & C. No. 4056
Cancels Tariff C. & C. No. 3988

I. C. C. No. 2828-B.
Cancels I. C. C. No. 2808-B.

NORFOLK & WESTERN RAILWAY CO.

DEMURRAGE RULES AND REGULATIONS

GOVERNING CARS CONTAINING

ANTHRACITE COAL, BITUMINOUS COAL, COAL BRIQUETS OR COKE

For Trans-Shipment By Vessel

—AT—

Norfolk and Lambert's Point, Va.

Issued June 25, 1920 **Effective July 1, 1920**

Issued on five days' notice, under special permission of the Interstate Commerce Commission, No. 30172 of June 24, 1920.

Issued by

D. E. SPANGLER, Gen'l. Superintendent Transportation, ROANOKE, VA.

J. R. TALBOTT, Supt. of Car Service, ROANOKE, VA.

J. R. RUFFIN, Freight Traffic Manager, ROANOKE, VA.

T. D. HOBART, General Coal Freight Agent, ROANOKE, VA.

800

DEMURRAGE RULES AND REGULATIONS GOVERNING CARS CONTAINING ANTHRACITE COAL, BITUMINOUS COAL, COAL BRIQUETS OR COKE FOR TRANS-SHIPMENT BY VESSEL AT NORFOLK AND LAMBERT'S POINT, VA.

RULE 1—CARS SUBJECT TO RULES.

Cars containing anthracite coal, bituminous coal, coal briquets or coke, for trans-shipment direct to vessels, either cargo or fuel supply, or to be stored for shipment by vessels when held for or by consignors or consignees for unloading, forwarding directions, or for any other purpose are subject to these rules, except—

(a) Cars reconsigned or reshipped for rail delivery or to another rail destination will be subject to the National Car Demurrage Rules (J. E. Fairbanks, Agent's, I. C. C. No. 4, N. & W. Tariff No. 10001-T), supplements thereto and reissues thereof, from arrival.

NOTE—Norfolk Terminals consist of a system of main and connecting side tracks extending from Mile Post 8 at the western boundary of said terminals to the piers and tracks adjacent at Lambert's Point. Coal, coal briquets or coke for delivery to vessels held in cars on tracks within the boundaries of Norfolk Terminals is available for delivery to the piers upon customary notice of owner.

RULE 2—FREE TIME ALLOWED.

An average of five (5) days per car free time will be allowed, except on coke for export, on which an average of ten (10) days per car free time will be allowed.

RULE 3—COMPUTING TIME.

(a) A notice of arrival must be sent or given to the consignee in writing or as otherwise agreed to by carrier and consignee upon arrival of cars and billing at Norfolk Terminals, Va.

Time will be computed from the first 7 A. M. after the day on which notice of arrival is sent or given to the consignee.

NOTE—In computing time Sundays and legal holidays (national, state and municipal), but not half-holidays, will be excluded. When a legal holiday falls on Sunday, the following Monday will be excluded.

The following are legal holidays:

January 1st	New Years Day
January 19th	Lee's Birthday.
February 22d	Washington's Birthday.
May 30th	Memorial Day.
July 4th	Declaration Day.
First Monday in September	Labor Day.
Tuesday following first Monday in November	General Election Day.
Thanksgiving Day	Generally last Thursday in November.
December 25th	Christmas Day.

(b) A car shall be considered as released:

1. At the time vessel registers for the cargo or fuel supply of which the coal, coal briquets or coke dumped into such vessel is a part, except that when cars are unloaded before the vessel registers such cars shall be released when unloaded.
2. To avoid delay that would be entailed in switching out and delivering on shipper's order, in actual sequence of arrival, cars containing the same grade of coal, as indicated by the identifying consigning names or numbers on the waybills, the dates on which cars should have been so released (as indicated by the record) will be substituted for the dates on which equivalent tonnage was actually delivered and the detention will be computed on the basis of such substituted dates.
3. The dates shipments are transferred by written order and acceptnnce to another party shall be considered the date of release of the car for the account of the original consignee and subsequent detention shall be charged in the account of the new consignee without any free time allowance.
4. Any fraction of a day will be computed as one day.

RULE 4—DEMURRAGE CHARGES.

Settlement shall be made on the basis of detention to all cars released during the month. The date of arrival notice shall be subtracted from the date of release. From the total days detention to all cars thus obtained, deduct all Sundays and legal holidays following the date of arrival and five (5) days free time allowance for each car, except on cars containing coke for export deduct ten (10) days free time allowance for each car: the remainder, if any, will be the number of days to be charged at the rate of $2.00 per car per day. Excess credit days of any one month cannot be deducted from the excess debit days of another month.

Office Supreme Court, U.
FILED
NOV 29 1926
WM. R. STANSBURY
CLERK

No. 70.

OCTOBER TERM, 1926.

IN THE

Supreme Court of the United States

EMMONS COAL MINING COMPANY AND THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Plaintiffs in Error,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR NORFOLK AND WESTERN RAILWAY COMPANY, Defendant in Error.

J. HAMILTON CHESTON,
F. M. RIVINUS,
THEODORE W. REATH,
Counsel for Norfolk and Western Railway Company.

NOVEMBER, 1926.

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In the Supreme Court of the United States.

OCTOBER TERM, 1926. No. 70.

Emmons Coal Mining Company and the Fidelity and Casualty Company of New York, Plaintiffs in Error,

vs.

Norfolk and Western Railway Company, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

I.

OFFICIAL REPORT OF OPINIONS IN THE COURTS BELOW.

Norfolk and Western Railway Company vs. *Emmons Coal Mining Company and the Fidelity*

and Casualty Company of New York, 287 Fed. 168—District Court for the Eastern District of Pennsylvania, 1923 (R. 121).

Emmons Coal Mining Company, et al. vs. *Norfolk and Western Railway Company,* 3 F. (2d) 525—United States Circuit Court of Appeals for the Third Circuit, 1925 (R. 174).

II.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

DATE OF JUDGMENT UNDER REVIEW.

Judgment of the United States District Court for the Eastern District of Pennsylvania entered April 30, 1924, affirmed by United States Circuit Court of Appeals by judgment entered January 10, 1925. (R. 165, 180.)

III.

STATEMENT OF THE CASE.

The terminal yard tracks and piers for the transshipment by vessel of coal moving to tidewater from bituminous fields on the Norfolk and Western Railway, are at Lambert Point, near Norfolk, Virginia. At this terminal prior to the establishment of the tidewater coal pooling arrangement, hereinafter referred to, the Railroad classified and segregated on different tracks

each carload shipment of coal according to grade and consigneeship. Consignees of several grades distinguished them by different consigning names or numbers, necessitating as many classifications as there were grades of each consignee. Upon receipt of an order from a consignee to dump a given quantity of a certain grade of his coal, the Railroad would have already classified and would transfer the specified tonnage to the piers for dumping into the waiting vessel. To avoid the unnecessary labor and delay of picking out and switching to the piers cars of a given consignee containing the same grade of coal, in the order of their arrival at tide, the carrier by tariff rule (which is hereafter referred to as the Substitution Rule) had the right to deliver such cars in any order, releasing the cars, however, on the demurrage record in the order of arrival. Prior to the pooling arrangement only the cars of one consignee were interchangeable under the Substitution Rule.

Transshipment of coal at railroad tidewater terminals entails the practical problem of assembling carload units into cargoes and bunker lots with as little delay as possible to cars or vessels. In war time was developed the scheme of pooling cars of the same grade, so that carloads of coal of a given grade might be dumped on the order of any consignee who had on wheels

sufficient coal of that grade, without regard to the ownership of particular cars. The coal was not pooled in the sense of being dumped into storage bins, but remained in the cars. Thus by agreement the cars of different owners containing the same grade of coal became interchangeable under the Substitution Rule. An important object attained by pooling was the reduction of the number of classifications to the number of different grades of coal (no longer multiplied by the number of consignees).

Any pooling scheme requires an agreement among the transshippers (consignees) and with the Railroad. An arrangement for the pooling of coal shipments at the Lambert Point terminal of the Norfolk and Western was created through the organization of the Lambert's Point Coal Exchange in June, 1920.

This suit was brought by the Norfolk and Western Railway Company in the Federal District Court for the Eastern District of Pennsylvania against the Emmons Coal Mining Company and the Fidelity and Casualty Company of New York, as surety, to collect demurrage on carload shipments of coal consigned to Emmons in care of Lambert's Point Coal Exchange, Virginia, for transshipment by vessel during the period September, 1920,-March, 1921, inclusive. The Emmons Company was a member of the

Lambert's Point Coal Exchange during that period (R. 8-10).

The members of that Exchange agreed to the swapping of coal of the same grade and so informed the Railroad. The agreement was not confined to coal already arrived on the terminal yards,—coal passing Bluefield, West Virginia, the billing point of origin of all Norfolk and Western tidewater coal, was reported to the terminal by wire and entered on the Exchange books to the credit of the consignee. The latter could immediately draw equivalent coal over the terminal piers on the strength of such credits (R. 21-22).

An Exchange Manager kept books to show the amount of coal of each grade which had been entered to the credit of each Exchange member. Withdrawals of coal from the pool were likewise charged in these books so that at any given point of time each member's deposit balance appeared. Of necessity, for prevention of overdrafts, orders for disposition of members' coal deposits had to be handled by the Exchange Manager. Accordingly each member of the Exchange gave power of attorney to the Exchange Manager to transmit to the railroad orders for dumping the equivalent of the member's deposit. Copies of these powers of attorney were filed with the railroad agent at the terminal (R. 21-22).

The individual transshipper could voluntarily join the Lambert's Point Coal Exchange or he could stay out of it. Whether he joined or stayed out he was responsible, under the demurrage tariff, for detention of coal cars at the piers. In either case the substitution rule in the demurrage tariff required the railroad to release his cars on the demurrage record in sequence of their arrival upon the dumping on his order of equivalent cars of his own ownership (outside of the Exchange) or of equivalent cars without regard to ownership of them (as in the case of Exchange members) (R. 22-25).

The questions of tariff application and reasonableness and of law proposed in this appeal have been passed upon by the Interstate Commerce Commission in a proceeding instituted by this plaintiff and other members of the Lambert's Point Coal Exchange: *Smokeless Fuel Company,* et al. vs. *Norfolk and Western Railway Company,* 85 I. C. C. 395. The interpretation of the same tidewater demurrage tariff in its application to the status created by the rules of Lambert's Point Coal Exchange was examined by the Commission. The assessment of the charges for which the Railway Company is here suing was found correct and in accordance with the tariff, and the tariff itself was deemed reasonable.

Authority for reliance on the Interstate Commerce Commission's interpretation of this tariff, as expressed in the Commission's decision,—85 I. C. C. 395, above-noted,—is shown by the following extract from an opinion by the Circuit Court of Appeals for the Eighth Circuit, in *Davis, Director General of Railroads,* vs. *Prairie Pipe Line Company,* 298 Fed. 393, at page 397:—

> "The construction of a freight tariff is a question of law. * * * We are not bound, of course, by the finding of the Commission as to a matter of law; but it is a board with special experience and knowledge concerning these rate questions, and its decisions are helpful to the courts in arriving at correct conclusions."

Concurrently with the present suit and with defense of the complaint before the Commission, this Railway Company brought suit in the Circuit Court of the City of Norfolk, Virginia, for demurrages against another member of the Lambert's Point Coal Exchange,—P. L. James and W. W. Houston, partners trading as Pan Handle Coal Company. The Railway Company's declaration,—termed under the Virginia practice a notice of motion for judgment,—was substantially identical with the statement of claim herein, and as in this case the questions therein raised, were

decided in favor of the Railway Company in two unreported opinions by the Hon. Allan R. Hanckel. On appeal to the Supreme Court of Appeals of Virginia, judgment for the Railway Company for the amount of damages assessed and sued for as in this case was affirmed: *James*, et al. vs. *Norfolk and Western Railway Company*, 129 S. E. 321 (Va. 1925).

IV.

ARGUMENT.

A. SUMMARY.

The Assignments of Error in this case appear at pages 182-183 of the record. The substance of the assignments may be grouped and argued under three heads.

1. The members of the Lambert's Point Coal Exchange were the consignees of the coal and were responsible individually for demurrage.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8. (R. 182-183.)

2. The demurrages sued for are computed with sole reference to the governing demurrage tariff.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8. (R. 182-183.)

3. The discharge of the rule for information was proper.

Assignment of Error 2. (R. 182.)

B. ARGUMENT.

B.-1. The members of the Lambert's Point Coal Exchange were the consignees of the coal and were responsible individually for demurrage.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8.
(R. 182-183.)

The question is who was the consignee of the coal,—the individual shipper or the Lambert's Point Coal Exchange?

Under the governing demurrage Tariff I. C. C. No. 2828-B (R. 16), cars are subject to demurrage "when held for or by * * * consignees for unloading, forwarding directions, or for any other purpose," with exceptions not applying in the present case. All coal shipments moving through the Exchange are billed,—as required by Rule 23 of the Articles of Organization and Rules of the Lambert's Point Coal Exchange (R. 17),—to the individual members in care of the Exchange. For example, "To Emmons Coal Mining Company, care of Lambert's Point Coal Exchange, Pool 1." Rule 23 requires that the shipping instructions

> "shall show as the consignee the name of the member for whose account shipped followed by the words 'care Lamberts Point Coal Exchange Pool '"

Consignments made by Emmons Coal Mining Company were so billed. Where a shipment is

consigned to "A" care of "B," "A" is the consignee. Section 676 of Volume 2, 3d Edition of Hutchinson on Carriers, reads:—

> "Goods shipped to one person as consignee in care of another should be delivered to the consignee, and, in case he cannot be found, then to the one in whose care they are shipped."

Schlesinger vs. *West Shore R. Co.*, 88 *Ill. App.*, 273, was a suit to recover the value of five barrels of whiskey shipped from New York to "B. H. Kemper, Chicago, Ill., care Berkenfield Ex." The plaintiff complained of a delivery to Kemper without surrender of the bill of lading, but the Appellate Court, in affirming a directed verdict for the Railroad Company, defendant, said, at page 276:—

> "Now * * * Kemper, in this case, was the consignee, and being so the title to the whiskey was vested in him," etc.

And again, at page 277:—

> "It is not claimed that there were any conditions or qualifications connected with the delivery of the whiskey by appellants to the carrier beyond the fact that, as expressed on the face of the bill of lading, it was consigned to Kemper, in the care of Berkenfield's express.
>
> "Kemper was the consignee."

The form of consignment in *United States Express Company* vs. *Hammer,* 21 Ind. App., 186, was "For R. C. Hammer, Indianapolis, Ind., in care of American Express Co.," and Hammer complained of the Express Company's refusal to make delivery to him. The Court held that he was consignee and entitled to the property. Other cases recognizing that the consignee is the person to whom the property is addressed and not the "in care of" party are *Great Lakes Coal and Dock Co.* vs. *Seither Transit Co.,* 220 Fed. 28-C. C. A.-8-1915; *Hoops* vs. *Wells Fargo & Co.,* 176 Ill. App., 620; *Commonwealth* vs. *People's Express Co.,* 88 N. E., 420; and *Ela* vs. *American Merchants' Union Express Co.,* 29 Wis., 611. The law accords with common usage generally. Thus a letter as well as a shipment addressed to A in care of B is intended for A, not B.

By the Exchange Agreement the transshipper has all the effective rights of a consignee (R. 17). By Rule 23 he consigns to himself, not to the Exchange. By Rule 14 he places orders for delivery of coal to vessels with the Manager of the Exchange; by Rule 15 he is "entitled to receive coal from a classification on" his order up to "the tonnage standing in" his name. By Rule 17 the members of the Exchange, including this transshipper, agree to pay any demurrage ac-

cruals under the tariff of the Railway Company for car days' detention, to be computed by subtracting the "date of arrival of cars shipped for account of the undersigned from the date of release of equivalent cars." The only function of the Exchange Manager is to police the integrity of the pool, and he must without discretion transmit the dumping order of a member to the Railway Company after ascertainment only of the fact that the ordering member has a sufficient deposit of coal in the pool to satisfy his order.

The Exchange was organized for the sole purpose of expediting transshipment by swapping of equivalents—not to assume any of the transshippers' obligations to the carrier. Emmons' argument would make the carrier look for its demurrage charges to an entity without assets, and without anyone secondarily and ultimately liable therefor.

Emmons urges that the Exchange is to be deemed the common consignee of all shipments to its members in its care. He insists upon the conclusion that the Exchange Manager has complete possession and control of the coal and the Exchange member, by the same sign, has no control. But the conclusion is contradicted by the form of consignment and (as we have seen) by the legal effect of the form of consignment; and is contradicted also by the Exchange Rules,

as above noted. The transshipper's possession and control of his coal is recognized in the fact that he can at any time up to the moment of actual dumping of the particular car consigned to him reconsign that car either in transit or after arrival at Lambert Point terminal. Rules 6 and 26 of the Exchange contemplate reconsignment by the member of cars already taken into the pool books (R. 19, 24). Of necessity, however, to protect the pools from overdrafts, reconsignment orders must pass through the Exchange Manager so that the reconsigned car may be removed from the member's Exchange account. The Circuit Court of Appeals in this case held as matter of law that the documents constituted the individual transshipper the consignee liable for demurrage. The Court said at page 528 of the reported opinion (R. 178):—

> "The defendant below also seeks to avoid liability upon the demurrage claim of the plaintiff by a further contention to the effect that, under the facts disclosed by the pleadings, the Lambert's Point Coal Exchange was the actual consignee of the coal shipped, not the Emmons Coal Mining Company, and as such recovery of the demurrage charges must be from it, and not from the defendant. As stated, *supra,* the cars were consigned to the shipper himself, 'care of the Lamberts Point Coal Exchange Pool.' Where goods

> are consigned to one person in care of another, by the general rule the title to the goods is in the consignee. It is true, exceptions to the rule may exist, but no facts appear in the present record to bring the shipments of the Coal Company within the scope of such exceptions."

The Commission in the *Smokeless Case* (85 I. C. C. at page 401), also ruled that the method of consignment constituted the transshipper the consignee for demurrage:—

> "The coal was consigned to individual shippers, 'care Lambert's Point Coal Exchange,' and the law seems to be well settled that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped. At all times the individual shippers had sole control over the tonnage standing to their credit, subject only to the requirement that their orders must be handled through the manager of the Exchange. The record will not support the conclusion that the Lambert's Point Coal Exchange was the common consignee, nor that it was unreasonable not to make the Exchange the common consignee."

I. C. C. *vs.* D. L. & W. R. *et al.*, 220 U. S. 235, known as the "Forwarding Case," is relied upon by Emmons as supporting the theory that

the consignee was the Exchange. In that case the Interstate Commerce Commission had condemned as unreasonable a published tariff rule by which the carriers in effect undertook to decline to accept aggregated less-than-carload shipments of different owners as carload lots. The Circuit Court enjoined the Commission's order. This Court held that the order was within the Commission's administrative authority and could not be controlled by the Courts.

There is no resemblance between the facts of the Forwarding Case and the instant case. This Railway Company has not tried to forbid combination of shipments of different ownership into one consignment, nor have the shippers endeavored to combine their shipments. The Exchange members have agreed to swap cars of equivalent tonnage, preserving, however, individual responsibility for freight charges and for detention of cars containing equivalent tonnage of their shipments. The demurrage tariff is applied in the same way to the accounts of Exchange members as to accounts of shippers outside of the Exchange.

The opinion of the Supreme Court of Appeals of Virginia in James *et al vs.* Norfolk and Western Railway Company, 129 S. E. 321 (Virginia 1925), at page 322, recognizes that the "Forwarding Case" has no application to the Lambert's

Point Coal Exchange situation. The Court distinguishes the facts of that case from "the Lambert's Point Coal Exchange" which

> "was neither the shipper nor the consignee of any of the cars of coal which went into the pools, but the voluntary agency of the shippers which kept the records of cars to the credit of the various members in each pool, and through its general manager gave orders to the carrier to dump the equivalent coal of the consignee into the vessel which berthed to receive and transport the coal of that particular consignee. The coal was shipped from the mines, consigned to the particular members of the coal exchange, who paid the freight to the carrier and assumed all the obligations under the tariffs, and gave notice of the arrival of the vessel to receive his coal to the general manager of the exchange, who gave instructions to the carrier to dump equivalent coal, if the consignee had sufficient to his credit in the pool. The carrier performed no service for the coal exchange, and the title to the coal was in the consignee; therefore the principle of the 'Forwarding Case' is not applicable to this case and the court did not err in overruling the demurrer of the plaintiffs in error, nor their contention on the merits that the Lambert's Point Coal Exchange was consignee of the cars of coal and alone liable for the demurrage."

B.-2. The demurrages sued for are computed with sole reference to the governing demurrage tariff.

Assignments of Error 1, 3, 4, 5, 6, 7, and 8.
(R. 182-183.)

These assignments raise only the question whether the demurrage was computed in accordance with the tariff. The Railway Company agrees that demurrages must be computed in exact accord with the tariff and the tariff alone. The tariff under which these charges were assessed is known as Norfolk and Western Railway Tariff I. C. C. No. 2828-B, Record, pages 15 and 16.

It will be convenient to review the practice followed by the Railway Company in keeping the demurrage account of an Exchange member such as Emmons. When cars consigned to Emmons, in care of the Exchange, arrived at Lambert Point they were entered on Emmons' demurrage account in order of arrival. Notice of arrival was immediately sent or given Emmons and the detention was computed from the first seven A. M. thereafter, in accordance with Rule 3 (*a*). The date of release of a car is determined by Rule 3 (*b*). Under the provision of Rule 3 (*b*)-2,—(the substitution rule)—the date on which a car would have been released

if released in order of arrival will be substituted for the date on which equivalent tonnage was released on order of Emmons, and the detention computed on the basis of such substituted dates. In other words, the oldest car standing in Emmons' account is released on the demurrage record, although that car may not then have been actually dumped. In the demurrage computation against that car the date of notice of arrival is subtracted from the date of release, the result showing the total days' gross detention. From that total are subtracted all Sundays and legal holidays, in accordance with Rule 3 (*a*), and five days free time on each car, in accordance with Rule 2. If the total days' detention, after deducting all Sundays and holidays, is less than the five days free time allowed by the tariff, Emmons is given credits equivalent to the number of days by which it was less than five. If the total days' detention, less Sundays and holidays, exceeds the five days free time, Emmons is debited for the number of days of such excess. The credits and debits of each individual member are aggregated for "all cars released during the month," and the individual member is charged demurrage at the rate of $2.00 per car per day for the excess debits, if any, in accordance with Rule 4. If the individual's credits in a month exceed his debits

during the same month, on all cars released during that month, no demurrage is charged for that month.

Emmons argues that these demurrage charges were assessed on the authority of the Exchange rules instead of on the tariff, and are therefore invalid, because the Exchange rules were not filed with the Interstate Commerce Commission. The tariff fixed the charges and provided for the monthly calculation of demurrage; the substitution of tonnage; and calculation of demurrage on the basis of the date of arrival of the cars deducted from the date of registry of the vessel into which the particular consignee dumped equivalent coal. The charges were calculated by reference to the tariff alone.

The Exchange Rules were not published as a tariff. Publication is not required as these rules do not "in any wise change, affect, or determine any part or the aggregate of" charges or determine "the value of the service rendered to the * * * consignee": Section 6 of the Act to Regulate Commerce, paragraph 1, Vol. 8 U. S. Comp. Stat. §8569.

The decision of the Circuit Court of Appeals, at page 528 of the reported opinion (R. 178) answers this contention of Emmons in the following extract from that opinion (adopted almost

verbatim at page 328 by the Supreme Court of Appeals of Virginia in rendering its opinion in the case of *James*, et al., vs. *Norfolk and Western Railway Company, supra*):—

> "A study of the Tariff has convinced us also of the lack of force in defendant's further contention that plaintiffs' claim is invalid because based upon the Tariff *and* the rules of the Lamberts Point Coal Exchange, not upon the Tariff alone. We quite agree with Judge Thompson, whose order is the subject-matter of the instant writ of error, when he points out in his opinion that, while certain substitutions of coal may have been made under the rules of the Exchange, the demurrage charges were assessed entirely on authority and by virtue of the Tariff. The substitution of cars of one member for those of another, a matter of bookkeeping, was by authority of the Coal Exchange agreement, but the charges sought to be recovered by plaintiff were assessed only under the Tariff provisions which provide for demurrage from the end of the free time until the coal was ordered out by the shipper. Such provisions have not been essentially affected by the fact that there was a substitution of cars among members of the Exchange, when the situation thereafter between the shipper and the railroad is the same as before substitution, in that the former continued to have title to an amount of coal equal to that originally

shipped by him and the latter continued to have its cars detained, although not the identical cars, until the former ordered his coal unloaded."

Rule 3 (*b*)-1 of the tariff (defining release date) fixes the release date as the day on which the vessel registers for the cargo or fuel supply of which the coal dumped from the car into such vessel is a part. Then follows in the tariff rule an exception which is intended to be applied only in the absence of vessel registry date. In cases where the vessel does not in fact register, and only then, the date of actual dumping of the car is to govern release. Whether the main clause or the exception of rule 3 (*b*) 1 be applied, the following substitution rule 3 (*b*) 2 in either event is further to be applied and works a release in demurrage computations not of the actual car dumped but of the oldest car in order of arrival. But instead of using the exception where the main rule can not apply by reason of absence of vessel registry, Emmons seized upon rule and exception and seeks to apply both on the same car. Thus the vessel registry rule and the substitution rule are employed to release the oldest car and at the same time the exception is employed to release the car actually

dumped,—two cars, they argue, are released on the dumping of one. Our opponent reads the exception clause as if it were concurrent with the main clause. Note that the main clause provides for release on registry of vessel to receive the coal, "except that when" the coal is dumped before vessel registry the dumping date is the release date. The exception clause is only applicable as an alternative when there is no prior registry date.

The Interstate Commerce Commission approved the Railway Company's interpretation in the *Smokeless case,* 85 I. C. C. saying at pages 398 and 399:—

> "The basic contention of complainants is that the governing tariff did not authorize the collection of demurrage on a car after that car had actually been unloaded, and they rely particularly upon paragraph 1 of rule 3 (*b*) in support of this contention. In other words, if A's car was unloaded on the order of B, it should then have been released from demurrage because it was unloaded before the registry of A's vessel. Complainants further contend that under the substitution rule of paragraph 2, B's car should also have been released from demurrage at the same time, because the date upon which 'equivalent tonnage was actually delivered' became the release date of such car. As

assessed by defendant, demurrage continued to run against cars standing to the credit of any shipper, even though such cars had actually been unloaded, until he gave orders to dump equivalent tonnage, the date of such release being governed by the registry date of the vessel into which the coal was dumped, or by the date of unloading into the vessel if that took place prior to registry.

* * * * * * *

"While the tariff is clumsily worded, there can be no doubt that defendant's construction is in accord with its intent and that, so far as equity is concerned, complainant's contentions are without merit. However, a tariff must be strictly construed. In our opinion, defendant's interpretation" (the carrier is here referred to) "was correct. Paragraph 1 provides that a car shall be considered as released 'at time vessel registers for the cargo or fuel supply of which the coal * * * dumped into such vessel is a part,' and paragraph 2 permits the substitution of any car containing a similar grade of coal for the one ordered dumped. The substitution of dates is merely a bookkeeping arrangement. The exception contained in paragraph 1 can release a shipper from demurrage only when the car which is unloaded contains tonnage, equivalent or otherwise, which becomes a part of the cargo or fuel supply of the vessel as

the result of his order. If such cars are thus unloaded before the vessel registers, the date of such unloading, rather than the date of registration, determines the release of the shipper in the demurrage account. This is the meaning of the rule when read in its entirety."

Substantially the same tariff rules for substitution and release as applied to pooled coal were considered and approved by the Supreme Court of Appeals of Virginia in Smokeless Fuel Company *vs.* Chesapeake and Ohio Ry. Co., 128 S. E. 624 (Va. 1925), at page 630:—

"The fuel company insists that, when a substituted car (one of later arrival) is actually dumped into a ship, it is released under clause 1, and that the car for which it is substituted is also released by virtue of the substitution; that this is the price paid by the carrier for the privilege of substitution. If this be true, then there has been no substitution. The effect of the argument of the fuel company is that practically for every car dumped under clause 4 two cars are released from demurrage debits, although the railroad company has the use of only one of them. This loses sight of the prime object of demurrage charges, and especially fails to give effect to that provision of clause 4, declaring:

"'In this event the dates on which the substituted cars are delivered will be used in computing the detention of the cars for which they are substituted, so that as far as credit and debit days are concerned, the record will be the same as though the cars were delivered in the order of their arrival.'

"The substitution of the cars of one member for those of another is a mere 'matter of bookkeeping' authorized by the exchange agreement.

"Rule 3 is a demurrage tariff, intended to expedite transportation, and it would require very plain and unequivocal language to authorize the release of two cars, when only one was dumped and made available for use. The rule does not contain any such language. Clause 1 of rule 3 (*b*) refers to dumpings in the order of arrival. Clause 4 to dumpings '*otherwise* than in the order of arrival.' A car cannot be dumped in the order of arrival and also *otherwise* than in the order of arrival. The facts of the particular case must determine whether the dumping is to be done under clause 1 or clause 4. The two clauses cannot be applied to the same cars at the same time. The substitution provided for by clause 4 is of substantial benefit to shippers in permitting one car to be substituted for another, and in changing the date from which detention begins. Reading the rule as a whole, we find no authority for the contention that the dumping of the

substituted car operates to release, not only that car, but also the one for which it is substituted."

The argument is also made that avoidance of delay which would be entailed by switching for delivery of cars in the order of their arrival is a condition precedent to application of the substitution rule of the tariff. In common sense this can not be. The substitution rule would be quite impracticable of application if the railroad yard crew had to determine in each case where a substitution was permitted by the tariff whether delay would necessarily be avoided by the substitution.

Nor is the carrier's switching convenience which the tariff recites stated as a condition precedent. It is a recital of the motive or object sought to be attained by substitution. The condition of the right to substitute equivalents is that the carrier shall release the cars in the demurrage account in order of arrival, and this the carrier has done.

The argument is made that the dumping of the car of one Exchange member on the order of another constitutes a transfer "by written order and acceptance" within the meaning and opera-

tion of Rule 3 (*b*)-3 of the tariff (R. 16). The Court will note in this connection that Exchange members have agreed under the Exchange rules that the Exchange will take no cognizance of transfers or sales of tonnage between members,—see Exchange Rule 6 (R. 19). In fact there were, as we have seen, no transfers of tonnage between members in the sense of the tariff rule invoked. Rather there was a substitution of equivalents necessarily contemplated in all pooling arrangements and recognized, so far as demurrage consequences are concerned, by the substitution rule of the tariff. So the Interstate Commerce Commission understood and applied the rule as against this argument. The Commission, at page 399 of its opinion in the Smokeless case, *supra,* said:—

> "The tariff covered shipments to non-members of the Exchange as well as to members. Paragraph 3 of rule 3 (*b*) has reference to transfers of shipments by written order and acceptance, such as are occasionally made outside of any pooling arrangement. There were no transfers 'by written order and acceptance' within the pool which the terms of this paragraph can be construed to fit."

The opinion of the Circuit Court of Appeals in the instant case discusses this tariff rule for

transfers at page 527 of the reported opinion (R. 177):—

> "No transfers 'by written order and acceptance,' such as are contemplated by the rule, are under consideration in the present issue, and the section cannot be cited as authority for defendant's claim that it was released from the demurrage claimed in the present action.
>
> "As we read the Tariff, we are satisfied that it plainly contradicts defendant's contention that it absolves defendant from payment of demurrage upon cars unloaded in substitution of cars of another member of the Coal Exchange. Some clauses of it, each read by itself, may be lacking in clarity, but, read in conjunction with the entire context, they quite clearly sustain the interpretation of the plaintiff company."

Activities of some shippers may conceivably under a pooling plan bring it about that the aggregated free time of all cars in the pool is not exceeded in spite of the delays of some shippers.

Accordingly, Emmons argues that, in the absence of a showing that all cars in the pool were delayed in excess of the aggregated free time of all, the demurrage assessed is "constructive" or "fictitious" (R. 139). A pooling plan is conceivable in which the diligence of some shippers in releasing cars within the free time allowed by

the tariff might be turned to the benefit of other shippers who did not so release their cars—the unused free days of the diligent might be made available (by common consigneeship) to cancel the debit days of the slow shippers. No reason is perceived why the diligence of some should be made to inure to the benefit of others. The present plan expressly denies such cancelling of demurrages. And the tariff, as applied to the facts, has been found reasonable by the Commission. The Circuit Court of Appeals explains and answers this complaint at page 528 of the reported opinion (R. 179-180):—

> "The defendants (below) have attacked the tariff upon which the claim of the Railroad Company is based, and the practice of the Railroad Company thereunder, from still another angle. It will be remembered that the coal shipped by each member of the Coal Exchange was credited to him in the Exchange when it passed Bluefield, West Virginia, and after being so credited he was entitled to at once order the withdrawal of an equal amount of coal from the Exchange, although his own coal would not actually be delivered at Lamberts Point for several days. This arrangement was made possible by the substitution clause of the Coal Exchange Rules. The defendants have pointed out that this practice enabled the Railroad Company to charge demurrage although no

actual detention of its equipment beyond the free time had actually occurred. It is true, that when a shipper exercised his right to order an equal amount of coal out of the Pool as soon as his own coal had passed Bluefield, his order released cars in the Lamberts Point yard containing coal of another member of the Exchange, and there was no actual detention of equipment while his own cars were in transit to Lamberts Point.

"In setting forth this phase of their case, defendants have attacked the Tariff as unreasonable. In considering the question of the reasonableness of the Tariff, we must not overlook the fact that the above practice was one which inured to the benefit of members of the Coal Exchange as well as the Railroad Company, as it enabled them to avoid the expenses incident to delays of vessels awaiting arrival of the coal shipped, while it actually injured nobody, as demurrage was charged only from the date of arrival to the date the cars were ordered to be dumped, less the free time, as provided by Tariff. The shipper who had cars standing in the yard was not injured because another was allowed to substitute those cars for his own cars in transit. If there had been no power of substitution, demurrage would have been charged against his cars in just the same way.

"The Interstate Commerce Commission had the Tariff under discussion in the instant

case before it for consideration in the case of Smokeless Fuel Co. *vs.* Norfolk & Western Railway Co., 85 I. C. C. Rep. 395. The issues there involved were the same as those involved here. The Commission held the Tariff and the practice of the Railroad Company thereunder to be reasonable and proper. We need not discuss the extent to which the decision of the Commission controls us, because we find ourselves in full accord with it."

B.-3. The discharge of the rule for information was proper.

Assignment of Error 2. (R. 182.)

By this Assignment Emmons attacks the lower Court's refusal to require the Railway Company to furnish certain information as set forth in the assignment. In general the information sought related to the receipts and dumpings of other members of the pool and its object was to show how their dumping activities might have reduced Emmons' demurrages. But the correct application of the tariff made this information irrelevant and it was properly excluded.

And the Circuit Court of Appeals so held at page 529 of the reported opinion (R. 180):—

"The conclusion that no error existed in the judgment in so far as the main issues were concerned in effect disposes of that assignment of error relating to the refusal

of the District Court to order the discovery of certain matters on the part of the Railway Company. The information sought was relevant and material only in case the Coal Company were correct in its contentions, hereinbefore discussed, regarding the Tariff and the application of it; and those contentions failing, the second assignment of error falls with them."

CONCLUSION.

In conclusion we respectfully submit that the rulings and judgment of the Court below should be affirmed.

Respectfully submitted,

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PHILADELPHIA, November, 1926.